Federal Court  Cour fédérale

Date: 20181228

Docket: IMM-2645-17

Citation: 2018 FC 1145

Toronto, Ontario, December 28, 2018

PRESENT: The Honourable Mr. Justice Diner

BETWEEN:

ROZAS DEL SOLAR, PAOLA
ZEVALLOS ZUNIGA, LUIS
ZEVALLOS ROZAS, SOFIA
ZEVALLOS ROZAS, MACARENA

Applicants

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

and

THE CANADIAN ASSOCIATION OF REFUGEE LAWYERS
THE CANADIAN COUNCIL FOR REFUGEES AND L'ASSOCIATION QUÉBÉCOISE DES AVOCATS ET AVOCATES EN DROIT DE L'IMMIGRATION

Interveners

AMENDED JUDGMENT AND REASONS

I. Introduction

[1] The Applicants are a Chilean family of refugee claimants whose claim was rejected by both the first and second level administrative tribunals. They have come to this Court seeking judicial review of the second tribunal decision [Decision], made by the Refugee Appeal Division [RAD]. The outcome of this judicial review turns on important but highly technical questions involving the standard of review applied by the RAD to its assessment of credibility findings made by the lower tribunal, the Refugee Protection Division [RPD]. Despite the technicality of the legal issues being addressed, I attempt to explain the law and key legal concepts in a clear and simple way, including why I ultimately conclude that the Decision is fatally flawed and must be redetermined.

II. Background

[2] The family – a husband, wife and their two daughters – are citizens of Chile, where they claim that a loan shark is threatening to harm them over an unpaid, high-interest debt. This claim was determined not to be credible and, as a result, rejected first by the RPD, and then on appeal by the RAD. For those not familiar with the refugee determination process, both the RPD and the RAD are divisions of the Immigration and Refugee Board of Canada [IRB] — the largest independent administrative tribunal in Canada specialized in refugee adjudication. The *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA], provides the IRB with its statutory jurisdiction.

[3] At first instance, an RPD member heard the Applicants' claim over two days, on December 8, 2015 and January 7, 2016. The tribunal dismissed the claim in written reasons dated February 19, 2016, finding that the husband's and wife's stories were not credible and that adequate state protection was available to them in Chile.

[4] The Applicants appealed to the RAD. In all preceding cases, RAD appeals, like RPD hearings, had been decided by a single panel member. However, on June 22, 2016, the IRB Chairperson ordered the Applicants' appeal to be heard by a three-member panel under section 163 of IRPA for the first time since the RAD's establishment in December 2012.

[5] The reason why the IRB Chairperson ordered a three-member panel goes back to a claim involving a different family of refugee claimants, a case ultimately appealed in *Canada (Citizenship and Immigration) v Huruglica*, 2016 FCA 93 [*Huruglica*]. In *Huruglica*, the Federal Court of Appeal held that, when considering the RPD's factual and legal conclusions on appeal, the RAD must typically apply a correctness standard of review.

[6] What the Federal Court of Appeal left open in *Huruglica*, however, was the question of how the RAD should show restraint or deference to some of the RPD's conclusions on credibility where the RPD was better-positioned to make them. Therefore, the IRB Chairperson decided that this RAD appeal provided the factual backdrop for a three-member panel, which has a precedential effect for future RAD and RPD panels (IRPA, s 171(c)). This would allow the RAD to develop its own law in appeals on credibility findings, as *Huruglica* had urged.

[7] The RAD's three-person panel decided this appeal in a May 17, 2017 split Decision. Both the two-member majority and the single-member minority upheld the RPD's refusal, but each under a different analytical framework and for different reasons. In short, the RAD majority decided that:

(i) the RAD owes deference to the RPD's credibility findings in some situations;

(ii) these situations may arise in various different contexts, in which the RPD has a meaningful advantage in making such credibility conclusions; and

(iii) in order to show deference when one of these situations arises, the RAD will not interfere with the conclusions if the RPD's reasoning process was comprehensible, and if the RPD's conclusions were based on the evidence.

[8] Applying its framework to the evidence before it, the RAD majority dismissed the family's appeal. What is problematic, however, is the RAD majority's framework regarding (ii), when there will be a meaningful advantage, and (iii) the concept of RAD reasonableness. The weaknesses in the RAD's Decision will be addressed below.

[9] The RAD minority also dismissed the appeal, but approached the legal analysis differently from the majority. In a nutshell, the minority concluded that some deference was owed where the RPD had a meaningful advantage in making credibility conclusions, but found that neither the framework, nor deference itself, should be defined to limit the RAD's authority to intervene in the RPD's decision, as it felt the majority had done.

[10] Before turning to the analysis of these issues, it is important to understand what lies at the heart of any judicial review, which is the standard of review that the Court applies to the decision-maker below which, in this case, is the RAD.

III. Standard of Review

[11] The Applicants have asked the Federal Court to judicially review the RAD's Decision under section 72(1) of IRPA. A judicial review is not an appeal or a rehearing of the Applicants' case (*Singh v Canada (Citizenship and Immigration)*, 2014 FC 1077 at para 9). Instead, the Federal Court's role on judicial review is far more limited and supervisory in nature, namely to ensure that the tribunal's decision is consistent with the rule of law (*Mission Institution v Khela*, 2014 SCC 24 at para 37).

[12] In other words, the Court's task on judicial review is not to retry cases. With respect to the Applicants, this means that my role is not to decide their refugee claims. Rather, it is to review whether the RAD's Decision contains reviewable errors (*Tsleil-Waututh Nation v Canada (Attorney General)*, 2017 FCA 128 at paras 78, 85). Should the Court find such errors, the appropriate remedy in such cases is, in general, to send the matter back for redetermination.

The Difference Between Correctness and Reasonableness Review

[13] In any judicial review, the Court must first select what standard of review applies to the issues raised. This is because the standard of review is the lens through which the Court analyzes the decision-maker's conclusions to determine whether judicial intervention is warranted (see *R v Skinner*, 2016 NSCA 54 [*Skinner*] at para 17).

[14] Today, there are only two such lenses: correctness and reasonableness (*Dunsmuir v New Brunswick*, 2008 SCC 9 [*Dunsmuir*] at para 34). A good analogy for this correctness versus reasonableness approach is darts. Sometimes, the decision-maker must answer the question exactly as the reviewer deems correct, or hit the bull's eye. Nothing less will do for a correctness review, as there is no margin for error (*Skinner* at para 22); for a reasonableness review, the outer rings will do.

[15] Simply put, when a correctness lens is used, the reviewer decides the question before it exactly as it thinks it should. If the reviewer's conclusion ends up being different than the decision-maker's, the reviewer will substitute its own answer as the correct one (*Dunsmuir* at para 50).

[16] For other types of questions, there is no one correct answer. This is where a reasonableness standard of review applies, and where there is typically a range of acceptable approaches to and outcomes for the legal questions raised. The decision-maker will have a margin of appreciation, or a range of acceptable solutions (*Dunsmuir* at para 47). Even if the conclusion is not the reviewer's preferred solution, the decision-maker's process and outcome just has to fall somewhere in that range of possible outcomes, although, sometimes there is only one possible outcome.

[17] This view of a reasonableness review has been consistently reinforced by the Supreme Court in the decade since *Dunsmuir* (see for instance, *Canada (Canadian Human Rights*

Commission) v Canada (Attorney General), 2018 SCC 31 [*CHRC*] at para 55, and *Wilson v Atomic Energy of Canada Ltd*, 2016 SCC 29 at paras 21–22).

[18] Turning back to our dartboard, in a reasonableness review, as long as the decision-maker hits a point that is not out of bounds, the reviewer will not intervene: s/he does not have to hit what the Court views as the bull's-eye (*Skinner* at para 23). Most dart players will not be able to hit the bull's-eye, and in judicial review decision-makers usually do not have to. Accordingly, tribunal decisions do not have to be perfect. On review, they should be approached as an organic whole, rather than the reviewer conducting a line-by-line treasure hunt for errors (*Communications, Energy and Paperworkers Union of Canada, Local 30 v Irving Pulp & Paper, Ltd*, 2013 SCC 34 at para 54).

[19] Of the two standards that comprise judicial review today, it should not be surprising, then, that reasonableness is far more common than correctness. Indeed, the Supreme Court has recently indicated that, "[i]n most cases, a contextual assessment leads to the conclusion that the appropriate standard of review is reasonableness" (*West Fraser Mills Ltd v British Columbia (Workers' Compensation Appeal Tribunal)*, 2018 SCC 22 [*West Fraser*] at para 8).

[20] Reasonableness – in name at least – thus appears to have become the default standard, not only in *West Fraser*, but also in other recent Supreme Court decisions such as *Groia v Law Society of Upper Canada*, 2018 SCC 27 (at paras 45–47). Certainly, where the decision-maker interprets the legislation that created the tribunal – its home statute – there is a strong

presumption of reasonableness (*CHRC* at para 27). Here, the RAD was interpreting various sections of IRPA, its home statute.

[21] Ultimately, the difference between correctness and reasonableness comes down to deference. Deference is the attitude that must be adopted when conducting a reasonableness review. Deference means that on some questions, the reviewer must respect the decision-maker's conclusions and accept them, even if the reviewer would have concluded differently based on the same arguments and evidence. This is because certain questions can be legitimately answered by an administrative decision-maker in more than one way (*Dunsmuir* at para 47).

[22] A correctness standard, on the other hand, requires no deference – the decision lies with the reviewer and no margin for error exists for the decision-maker below. The reviewer undertakes its own analysis of the question raised (*Dunsmuir* at para 50; *British Columbia Human Rights Tribunal v Schrenk*, 2017 SCC 62 at para 28).

Which Standard Applies to this Judicial Review

[23] Now I turn to which standard of review, correctness or reasonableness, applies in this case. Here, the Applicants say that the RAD erred in its answers to both of the key issues before it, namely:

1. Whether the RAD must apply a deferential standard of review when the RPD had a meaningful advantage in making a finding, using the majority's framework; and
2. whether in applying the framework to the facts, the Applicants' appeal should have been dismissed.

[24] It is clear that the first issue is reviewable on a reasonableness standard because it involves the interpretation of IRPA, the RAD's home statute (*Huruglica* at para 30). This gives rise to a presumption of reasonableness, which has not been rebutted here (*Williams Lake Indian Band v Canada (Aboriginal Affairs and Northern Development)*, 2018 SCC 4 at para 138; *Barreau du Québec v Quebec (Attorney General)*, 2017 SCC 56 at para 15).

[25] The second issue of whether the RAD's Decision was reasonable in light of the answer to the first question is also reviewable on a reasonableness standard, since it involves a matter of mixed fact and law (*Huruglica* at para 35). When it comes to questions of home statute interpretation, the range of reasonable answers can still be very narrow (*Huruglica* at para 44). In fact, sometimes the ordinary tools of statutory interpretation will permit only one reasonable answer (*McLean v British Columbia (Securities Commission)*, 2013 SCC 67 at para 38; *Canada (Canadian Human Rights Commission) v Canada (Attorney General)*, 2011 SCC 53 at paras 34,64).

Conclusion on Standard of Review

[26] Therefore, for the issues at bar, I must decide whether the RAD's conclusions were reasonable — whether they were justified, transparent, and intelligible, and if they fall within the range of answers that are defensible in fact and law (*Dunsmuir* at para 47). Although I am applying a reasonableness standard of review to these issues, and although the first issue may only have a very narrow range of reasonable answers or even a single answer, I must still be careful not to conduct a disguised correctness review. That would be to decide, in my view, the bull's eye answer and then find that any other answer is unreasonable. Rather, the RAD's

conclusion and the process of how the tribunal reached that outcome must be justified, transparent and intelligible.

IV. Analysis

Issue 1: Were the RAD's Conclusions on the Standard of Review Reasonable?

[27] To decide the first issue, I must first analyze whether the RAD made reasonable conclusions on its own standard of review for the RPD's credibility findings. To undertake this analysis, I will divide the first issue into the following three questions:

(i) Did the RAD reasonably conclude that it must apply two standards of review — correctness to most of the RPD's findings, and deference to some of the RPD's findings relating to credibility?

(ii) Did the RAD reasonably identify the conditions triggering the deferential standard?

(iii) Did the RAD reasonably define the content of the deferential standard?

[28] Before proceeding to my analysis of these three questions, I note that the first issue before me is quite narrow, despite the breadth of argument and analysis offered by the parties. Specifically, when the RPD makes a credibility finding based on oral evidence, and that finding is then challenged by way of appeal to the RAD, how does the RAD go about determining whether it should intervene? That is really what is meant by standard of review.

[29] Under a correctness standard, the RAD intervenes if the finding does not line up with its own reading of the record. If deference is due, then another framework must guide the RAD's

review for error. My task is, therefore, simply to determine the reasonability of the RAD majority's conclusions.

> *Question (i): Did the RAD reasonably conclude that it must apply two standards of review — correctness to most of the RPD's findings, and deference to some of the RPD's findings relating to credibility?*

The RAD on Question (i)

[30] In its majority decision, the RAD found that it should show deference to some findings of the RPD in specific cases. The RAD majority based this conclusion primarily on two observations.

[31] First, credibility is normally determined on the basis of an oral hearing. The majority relied, in part on what it described as "the seminal Singh decision" (*Singh v Canada (Minister of Employment and Immigration)*, [1985] 1 SCR 177), which found, regarding credibility findings made solely on the basis of written submissions:

> [59] [W]here a serious issue of credibility is involved, fundamental justice requires that credibility be determined on the basis of an oral hearing. Appellate courts are well aware of the inherent weakness of written transcripts where questions of credibility are at stake and thus are extremely loath to review the findings of tribunals which have had the benefit of hearing the testimony of witnesses in person.

[32] Second, under IRPA, the majority noted that while an oral hearing is always held by the RPD, the RAD rarely does so. The RAD majority concluded that the RPD is generally in a better position to make credibility findings and has expertise in doing so, which would justify some deference to those findings. It also referred to cases from the Federal Court supporting this

conclusion, see *Ahi v Canada (Citizenship and Immigration)*, 2016 FC 1028 at para 13; *Moya v Canada (Citizenship and Immigration)*, 2016 FC 315 at paras 29, 42; and *Koech v Canada (Citizenship and Immigration)*, 2016 FC 752 at para 32.

[33] Thus, the first question to answer in this judicial review is whether the RAD majority reasonably found that it should apply two standards of review: a correctness standard to most of the RPD's findings, and a deferential standard as the exception to some of the RPD's findings pertaining to credibility. The parties and interveners in this application diverge significantly on this question. They also argue different approaches as to how I should answer it.

Parties' Positions on Question (i)

[34] The Minister maintains that the question has already been decided by the Federal Court of Appeal in *Huruglica*, which, in his view, answered it by holding that the RAD is to apply a deferential standard of review to some RPD credibility findings where it has a meaningful advantage (see *Huruglica* at para 70, as reproduced later in these Reasons).

[35] Conversely, two of the interveners, the Canadian Association of Refugee Lawyers and the Canadian Council for Refugees [CARL/CCR] who presented joint submissions, focus on the plain language of IRPA's relevant sections and argue that these sections allow for only one standard of review for all factual findings: correctness. CARL/CCR submit that the Federal Court of Appeal's comments on deference in *Huruglica* refer only to the RAD's remedial power to remit a case back to the RPD for redetermination, and not to the lens it must use when examining the substantive part of a RPD decision.

[36] Similar to CARL/CCR, the Applicants submit that the RAD must review all findings for correctness. However, they differ in proposing that deference can nevertheless play a limited role alongside a correctness review.

[37] The third intervener, l'Association québécoise des avocats et avocates en droit de l'immigration [AQAADI], shares the Applicants' view of the RAD's role, although it notes that deference is more of a theoretical rather than a real option for the RAD. This is due to the nature of the underlying statute (i.e. IRPA) and because, according to AQAADI, there is almost never a situation where deference will be justified.

[38] The controversy between the parties comes down to how they read the comments in *Huruglica* on the RAD's standard of review in RPD appeals. The Federal Court of Appeal reformulated this Court's certified question, answering it as follows at paragraph 106 of *Huruglica*:

> Was it reasonable for the RAD to limit its role to a review of the reasonableness of the RPD's findings of fact (or mixed fact and law), which involved no issue of credibility?
>
> Answer: No. The RAD ought to have applied the correctness standard of review to determine whether the RPD erred.

[39] In coming to this answer, the Federal Court of Appeal considered the purpose and object of the statute, as well as the RAD's and the RPD's legislative scheme under sections 110 and 111 of IRPA. It referred to paragraph 111(2)(a), holding that the RAD must intervene when the RPD is wrong in fact or law. The Federal Court of Appeal noted that this translates to a correctness

standard as confirmed by IRPA's legislative evolution and history, which the RAD majority referred to at paragraph 18 of its Decision.

[40] The Federal Court of Appeal also made certain observations about paragraph 111(2)(b) of IRPA, which empowers the RAD to refer a case back to the RPD for redetermination, where it is of the opinion that it cannot confirm or set aside the RPD's decision without hearing the evidence presented before the RPD. These comments are central both to the outcome of *Huruglica* and to the issue before me, and I reproduce them here in full:

> [69] I now turn to paragraph 111(2)(b). It provides that once an error has been identified (paragraph 111(2)(a)), the RAD may refer the matter back for redetermination with the directions that it considers appropriate only if it is "of the opinion" that it cannot make a decision confirming or setting aside the RPD decision without hearing the evidence presented before the RPD. This possibility acknowledges the fact that in some cases where oral testimony is critical or determinative in the opinion of the RAD, the RAD may not be in a position to confirm or substitute its own determination to that of the RPD.
>
> [70] 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.
>
> [71] One can imagine many possible scenarios. For example, when the RPD finds a witness straightforward and credible, there is no issue of credibility per se. This will also be the case when the RAD is able to reach a conclusion on the claim, relying on the RPD's findings of fact regarding the relative weight of testimonies and their credibility or lack thereof.

> [72] Problems will occur when the credibility findings themselves are disputed on appeal, and the RAD has no way to reach a conclusion without endorsing or rejecting those findings. If the RAD can identify an error in situations where, for example, a claimant was not found credible because his story was not plausible based on common sense, the RPD may have no real advantage over the RAD.
>
> [73] Similarly, there may also be cases where a finding that a witness is not credible was based on discrepancies that could not justify such a conclusion or that simply did not exist. If the assessment of the oral evidence contains an error which the RAD can easily identify, but the weight to be given to this testimony is essential to determine whether the RPD decision should be confirmed or set aside, the RAD may conclude that it is a proper case to refer back to the RPD with specific directions in respect of the error identified in the credibility findings.
>
> [74] That said, it is not appropriate to say more about the various scenarios that may arise, for they are not before us. The RAD should be given the opportunity to develop its own jurisprudence in that respect; there is thus no need for me to pigeon-hole the RAD to the level of deference owed in each case.

[41] The Minister argues that, since ordinarily the same standard would apply to all findings of fact, the Federal Court of Appeal must be taken as having turned its attention to the RPD's factual findings relating to credibility. By excluding such credibility findings from its answer to the certified question, it ruled that the correctness standard was not the appropriate standard of review.

[42] The Minister argued that credibility findings were a central feature of *Huruglica*, flowing from the Federal Court of Appeal's observations about when the RPD may enjoy a meaningful fact-finding advantage. As such, these are not *obiter* (incidental or extraneous) comments, as suggested by others in submissions.

[43] CARL/CCR counter that such a view wholly misreads *Huruglica*. They argue that, at the quoted paragraphs 69–74, the Federal Court of Appeal was only referring to the deference that the RAD may show in its choice of remedy, and not in its task of reviewing the RPD's decision for error.

[44] In explaining their interpretation of *Huruglica*, CARL/CCR refer to the inquisitorial process played by the RAD. To explain, in an inquisitorial proceeding, the decision-maker plays a more active role, such as questioning the witnesses. In an adversarial proceeding, the decision-maker plays a less active role, and acts more as of a referee who observes, intervening only on a limited basis (see *Benitez v Canada (Citizenship and Immigration)*, 2007 FCA 199 at paras 15, 18, 28).

[45] Turning back to CARL/CCR, they argue that when the Federal Court of Appeal mentioned the RPD's meaningful advantage, it was referring to the RPD's ability to shape the inquisitorial record through an oral hearing, which the RAD cannot ordinarily do. Based on this rationale, CARL/CCR assert that the RAD wrongly concluded that the RPD holds any advantage in the ability to interpret the record. CARL/CCR argue that the comments in *Huruglica* on deference are wholly unrelated to standard of review. Rather, they are solely related to the RAD's remedial powers under section 111 of IRPA.

[46] With respect to the standard of review that the RAD must apply to the RPD's credibility findings, CARL/CCR argue that the plain language meaning of IRPA, along with the Federal

Court of Appeal's statutory analysis in *Huruglica*, leads to only one result: that the RAD must review all RPD findings on a correctness basis.

[47] CARL/CCR argue that no other reading is defensible, considering that:

(a) the RAD has sole and exclusive jurisdiction to hear and determine all questions of fact under subsection 162(1) of IRPA;

(b) a person may appeal to the RAD on a question of fact under subsection 110(1) of IRPA;

(c) the RAD must either confirm the RPD's determination, substitute its own determination, or refer the matter back if the RAD cannot do so without hearing the evidence (IRPA, subsection 111(1) and (2)); and

(d) per their reading of *Huruglica,* the statute empowers the RAD to review all RPD findings for correctness.

[48] CARL/CCR further argue that a correctness review of all RPD findings is supported by the RAD's legislative purpose. They note that prior to the creation of the RAD, two RPD members used to sit in determination of each refugee claim. The RAD was meant to introduce efficiencies in the refugee determination process without diminishing the safety net of having every claim independently decided by two members.

[49] The Applicants share CARL/CCR's view that IRPA unambiguously requires a correctness review for all findings of fact. They emphasize that, when *Huruglica* equated the use of the word wrong (IRPA, section 111(2)(a)) to a correctness review, the Federal Court of

Appeal noted "it would make little sense to give the word 'wrong' a different meaning depending on whether it relates to the words 'in law', 'in fact' or 'in law and in fact'" (at para 65). The Applicants assert that it would make no sense to interpret wrong differently depending on whether the factual finding at issue relates to credibility or not.

[50] Unlike CARL/CCR, the Applicants acknowledge *Huruglica* envisioned a role for deference, but argue that the RAD should only show deference outside the ambit of standard of review; they say that the RAD's deference should be expressed as a restraint before applying a correctness standard.

[51] At the hearing, the Applicants suggested that deference was understood in this way by Professor Daly in his theories of "doctrinal" and "epistemic deference" (Paul Daly, *A Theory of Deference in Administrative Law: Basis, Application and Scope* (Cambridge, UK: Cambridge University Press, 2012 at 7–9). Professor Daly explained these concepts of deference as representing reasonableness and the giving of weight, respectively.

[52] The Applicants also refer to the Federal Court of Appeal's analysis in *Re: Sound v Fitness Industry Council of Canada*, 2014 FCA 48 [*Re: Sound*], which they say supports their approach to correctness with deference. Finally, the Applicants argue that the RAD minority approach appropriately envisions a role for deference alongside a correctness review.

Analysis on Question (i)

[53] While the statutory interpretation proposed by CARL/CCR may have some merit, this Court is nonetheless constrained by the case law to conduct a reasonableness review of the RAD's Decision, particularly in light of the Federal Court of Appeal's observations in *Huruglica*. In my view, to construe the Federal Court of Appeal's comments as being strictly limited to deference on remedy, as CARL/CCR assert, would strain the text of that judgment given how the concept of deference is ordinarily understood.

[54] The Federal Court of Appeal specifically observed that problems would arise when the RPD's credibility findings themselves were challenged before the RAD (*Huruglica* at para 72, as reproduced above). Further, the general statutory analysis in *Huruglica* contained these observations on paragraph 111(2)(b) of IRPA:

> [58] Sections 110 and 111, reproduced above, deal with appeals from the RPD to the RAD. Subject to my comments with respect to paragraph 111(2)(b), I generally agree with the RAD's finding that neither section 110 nor 111, nor the legislation as a whole, point to the need to show deference to the RPD's findings of fact. As acknowledged by the RAD in this case, these provisions evidence the legislator's intent that the RAD bring finality to the refugee claims determination process.
>
> [Emphasis added]

[55] With respect to the Applicants' position that deference can co-exist with a correctness review of all factual findings, I do not agree. Rather, correctness as a standard of review is defined by the absence of deference (*Dunsmuir* at para 34). In *Maritime Broadcasting System Limited v Canadian Media Guild*, 2014 FCA 59, the Federal Court of Appeal wrote:

"[c]orrectness review has always been review without any deference. 'Correctness with a degree of deference' is a *non-sequitur*. It would be like describing a car as stationary but moving" (at para 60).

[56] With this image in mind, the materials before me do not reflect that the Federal Court of Appeal envisioned a role for deference in the manner suggested by the Applicants. As a result, I am not persuaded by the Applicants' argument that the RAD must apply a single correctness review to all of the RPD's findings, and defer by showing restraint before applying correctness – even though I recognize that *Huruglica* at paragraph 70 (reproduced above) mentioned a degree of restraint twice.

[57] Finally, I do not find any merit to the sources that the Applicants rely upon, namely *Re: Sound*, and Professor Daly's views of doctrinal or epistemic deference.

[58] First, *Re: Sound* was decided on the basis of procedural fairness, and does not provide for correctness with some deference as a standard.

[59] Second, I do not find that Professor Daly's review of doctrinal and epistemic deference changes any of the foregoing analysis regarding whether the RAD analysis of standard of review for credibility findings was reasonable.

Conclusion on Question (i)

[60] Thus, it was reasonable for the majority to conclude that, under IRPA, it should apply two standards of review to RPD findings: correctness in most cases and deference on occasion. To the contrary, given the statutory analysis in *Huruglica*, this was clearly an outcome open to the RAD.

Question (ii): When should deference be triggered?

[61] The second question to be determined in this judicial review is whether the RAD majority reasonably set out the conditions triggering the application of a deferential standard of review. Put another way, for any given RPD finding, when should the RAD apply a correctness standard and when should it apply a deferential standard?

[62] At this point, it is useful to look at the conditions that trigger particular standards of review. First, in judicial review, the standard of review flows from a contextual analysis, unless the jurisprudence has already determined which standard applies to a particular category of question (*Dunsmuir* at para 62).

[63] Generally, deference is owed on questions of fact (see *Canada (Citizenship and Immigration) v Khosa*, 2009 SCC 12 [*Khosa*] at para 89, Rothstein J, concurring). When an appeal court reviews alleged errors of fact, a deferential standard of "palpable and overriding error" applies (*Housen v Nikolaisen*, 2002 SCC 33 [*Housen*] at para 10).

[64] Broadly speaking, one reason to apply a deferential standard of review to findings of fact is that first instance decision-makers are thought to be better-positioned to assess credibility, due to their expertise in making factual findings and their ability to see and hear witnesses (see *Khosa* at para 89; *Housen* at paras 12–14,18).

[65] The RAD, of course, is distinct from an appellate court, and thus many of the justifications for the deferential standard outlined in *Housen* (including respect for the integrity of the trial process and judicial economy) do not apply. When does deference apply to the RAD? I turn to its Decision to consider its findings on this key question under review today.

The RAD Decision on Question (ii)

[66] In the Decision, the RAD majority decided, based on its reading of *Huruglica*, that a deferential standard was only appropriate where the RPD truly had a meaningful advantage in making the finding at issue. The RAD majority held that such a determination must be made on a case-by-case basis and, where the RAD concludes that a meaningful advantage existed, it must explain why. The RAD majority, however, then went on to set out eight categories of RPD credibility findings. These are essentially a set of guidelines to be considered by future panels when the following situations arise, which I have numbered for ease of reference:

(i) inconsistencies, contradictions and omissions;
(ii) demeanour;
(iii) specialized knowledge;
(iv) relevant knowledge;
(v) implausibilities;
(vi) inferences;
(vii) documents; and
(viii) oral hearing.

[67] The RAD majority explained the context for each of these eight categories, some of which did not arise on the facts of this case. The RAD majority then reviewed when it might be at a disadvantage, and thus owe deference to the RPD for each of the eight categories, which I will briefly summarize below.

[68] First, the RAD majority noted that the RPD may have a meaningful advantage in assessing (i) inconsistencies, contradictions, and omissions in oral testimony. This is because the RPD sees and hears the witness, chooses which questions to ask, and listens to the answers.

[69] For the same reasons, the RAD majority also concluded that the RPD enjoys a meaningful advantage in the context of (ii) making demeanour findings.

[70] The RAD majority observed for (iii) specialized knowledge the RPD may sometimes have such knowledge that the RAD does not share. In that case, the RPD would be in a better position to make certain specialized knowledge findings and enjoy a meaningful advantage.

[71] The RAD majority also found that (iv) relevant knowledge is one area that might or might not provide a meaningful advantage to the RPD. The RAD majority explained this category as the claimant's level of knowledge with respect to religious or political views that are central to the refugee claim. It held that the RPD would enjoy no meaningful advantage when comparing testimony to documentary evidence. On the other hand, the RAD majority observed that the RPD might enjoy a meaningful advantage where the claimant had apparent difficulty in providing testimony, or was questioned by the RPD about inconsistencies or a lack of expected

knowledge, which would once again arise out of the RPD's ability to see, hear and question the witness.

[72] With respect to (v) implausibility findings and (vi) factual inferences, the RAD majority observed that, in most cases, it would be on equal footing with the RPD and thus have no meaningful advantage.

[73] Similarly, in (vii) findings based on documentary evidence, the RAD in most cases would be equally expert and able to review documents and make findings about them. However, the RAD majority observed that the RPD may have a meaningful advantage when assessing the veracity of original documents not before the RAD, relying on specialized knowledge about the document in question, questioning a claimant about inconsistencies relating to a document, or hearing an explanation provided by a witness.

[74] Finally, regarding (viii) oral hearings, the RAD majority noted that if it held an oral hearing and was able to see and hear witnesses, it would be at no disadvantage to the RPD regarding the subject matter of the hearing. It noted, however, that any RAD hearing is usually restricted to the issues raised in the appeal. For those findings not raised in the RAD hearing, the RPD would hold an advantage and would be owed deference.

Parties' Positions on Question (ii)

[75] The Applicants in this case argue that the RAD majority erred in pre-emptively establishing categories of credibility findings warranting deference, instead of leaving it to be

determined whether the RPD truly had a meaningful advantage on a case-by-case basis. They submit that the RAD established an unreasonably rigid approach, which ignores that there are many possible permutations and unique situations in any given case, such that the concept of meaningful advantage cannot be separated from the circumstances of the particular hearing within which a finding arises.

[76] The Applicants also argue that, under the RAD's model, whether a meaningful advantage exists seems to turn almost entirely on whether the finding at issue arose from oral evidence. In the Applicants' view, this will lead, in practice, to a deferential standard being applied by the RAD whenever the RPD's findings were based on oral evidence, which will lead, in turn, to an unreasonably broad band of deference, since virtually all credibility findings involve oral testimony and credibility is a core aspect of all refugee claims.

[77] The intervener AQAADI agrees with this position and submits that the RAD has, in certain subsequent decisions, failed to conduct a case-by-case analysis and has simply been deferential whenever the RPD's credibility findings were based on oral testimony (see, for instance, *X (Re)*, 2017 CanLII 94169 (CA IRB) at para 9).

[78] The Minister responds that the RAD majority did not err in setting out these categories since it made clear that the meaningful advantage inquiry must be done in every case. At the hearing of this application, counsel for the Minister suggested that the RAD was simply illustrating situations where the RPD was more likely to have a meaningful advantage. In the

Minister's view, the RPD's meaningful advantage generally derives from the RPD's role in holding an oral hearing where it can observe testimonial evidence.

[79] The Minister adds that if future RAD panels misinterpret the guidance provided in these categories and, as a result, are overly deferential in their review of RPD decisions, then this is something that can be corrected on judicial review. The possibility of unreasonable future RAD decisions does not mean that the RAD majority's model is flawed.

Analysis on Question (ii)

[80] In my view, the RAD majority's conclusions on the conditions triggering a deferential standard of review are unreasonable. This is because the RAD majority failed to identify any principled framework for determining whether the RPD had a meaningful advantage in making a credibility finding in a given case. Although the RAD majority found that the RPD may be in a better position to make certain findings when it has seen, heard, and questioned a witness, it offered no way to determine if such a meaningful advantage truly exists on a case-by-case basis.

[81] When queried on this apparent weakness of the eight-category framework at the hearing and the lack of particular guidance, counsel for the Minister suggested that not all legal theories can be "reduced to a slogan on a coffee mug". While that may be the reality, I nonetheless find that it was not open to the RAD majority, sitting as part of a three-member panel, to hold that deference flows from the RPD's meaningful advantage.

[82] However, the RAD then provided little direction for identifying when such an advantage arises: for most of its categories, the RAD finds that meaningful advantage, if it existed, would arise as a result of the RPD seeing and hearing the claimant and witnesses. Although the RAD majority held that the RPD may have a meaningful advantage in situations where it has heard and seen a witness, in its subsequent review of the merits of the RPD's decision it found that the RPD did in fact have a meaningful advantage whenever the finding at issue related to the Applicants' oral testimony.

[83] The Applicants point to several instances in the Decision where the RAD majority found that the RPD had a meaningful advantage justifying deference. In each case, the rationale was simply that the RPD had chosen which questions to ask, and saw and heard the witnesses' response. The RAD majority did not explain whether seeing and hearing the witness should always trigger a deferential standard nor why, in the Applicants' particular case, it did. As noted by the Applicants, these conditions of seeing and hearing the witness will always be present at an RPD hearing.

[84] One concrete way of determining whether the RPD was truly better-positioned and thus had a meaningful advantage in making a given finding would be to see if the basis for the impugned finding is disclosed in the record before the RAD. This was the general theme underpinning much of the argument before me at the hearing of this application. For instance, counsel for the Minister stated during oral argument that the concept of the RPD's meaningful advantage turns on information to which the RAD does not have access.

[85] Similarly, the Applicants observe in their written materials that the RPD may make a credibility finding on the basis of an event or circumstance in the hearing room that is not captured in the hearing recording or transcript. In such cases, the RPD could be said to have a meaningful advantage in the sense that the basis for the finding would not be available to the RAD for independent scrutiny.

[86] At the hearing of this application, the Applicants referred the Court to a number of cases in which their preferred approach has been adopted by the RAD in decisions post-dating the one currently under review. I will briefly review three such cases.

[87] First, in *X (Re)*, 2017 CanLII 142903 (CA IRB), the RAD found no meaningful advantage because the errors raised in the appeal pertained to "obvious" inconsistencies and discrepancies (at para 17). Referencing *Huruglica* and the majority in the RAD Decision, the RAD member held as follows:

> [17] … [M]y approach to the present appeal is to analyze the record and identify any errors that may have been committed by the RPD based on the issues identified in the Memorandum of Appeal. Then, I will render a decision in light of the evidence which forms part of the record. I note that the errors raised in this appeal pertain to inconsistencies and discrepancies in the evidence which are obvious on the face of the record. Having reviewed the entirety of the record and listened to the audio recording of the RPD hearing, I find that the RPD did not have a meaningful advantage over the RAD in assessing these discrepancies. As such, I have not shown the RPD deference with respect to these findings.

[88] Second, the RAD took a similar approach in *X (Re)*, 2017 CanLII 61324 (CA IRB). There, the RAD member held that the RPD did not have a meaningful advantage because the

issues related to "the substance of the testimony and not to any behavioural or any other item that the RPD could observe and the RAD could not" (at para 8).

[89] Third, in *X (Re)*, 2017 CanLII 142477 (CA IRB), the RAD panel held that, because it had listened to the recording of the hearing and read the RPD's conclusions, no meaningful advantage existed:

> [8] … In this case, even though some of the issues dealt with credibility assessments based on oral testimony, I do not find that the RPD was in an advantageous position, as I was able to listen to and understand the recording of the hearing as well as to review the conclusions of the RPD in its reasons, and I therefore do not review their findings on a reasonableness standard.

[90] I note that the rationale of the RAD on these points has been found reasonable by this Court on judicial review, see, for instance, *Odia v Canada (Citizenship and Immigration)*, 2018 FC 363 [*Odia*]:

> [5] Upon review of the RAD's decision, I see no basis upon which the Court's intervention is warranted. In this case, the RAD appropriately identified and stated its role in view of *Huruglica* (at para 103) to review the RPD's decision on a correctness standard, including the issue of credibility, and to conduct its own analysis of the record to determine whether the RPD had erred. The RAD reasonably determined that the RPD was not in an advantageous position to assess and determine the Applicant's credibility since the RAD was able to listen to and understand the recording of the RPD hearing and to review the RPD's conclusions in its reasons (see *Huruglica* at para 70).

[91] Under the approach taken in these three RAD decisions and in *Odia*, a deferential standard of review is applied only where a correctness review would not be practicable. This is consistent with *Ozdemir v Canada (Citizenship and Immigration)*, 2015 FC 621, in which Justice

Zinn held that it was unreasonable for the RAD to review the RPD's credibility findings on a deferential standard, when the RAD was in as good a position as the RPD to assess the evidence:

> [5] Throughout the section on credibility the RAD states that the RPD's credibility findings were "reasonable" and never does its own analysis as to whether it would have reached a similar conclusion based on the evidence. I add that there was nothing in the RPD's credibility analysis that turned on the demeanour of the applicant in the witness box. Rather, the assessment of credibility was based on omissions and discrepancies between his Basis of Claim and his oral testimony. Accordingly, the RAD was in as a good a position as the RPD to make its own determination of the applicant's credibility based on the recording of the hearing, the documents, and the explanation offered to the RPD.

[92] If meaningful advantage occurs only where the RPD bases its decision on some factor that cannot be reproduced in the record, the situations in which the RPD is truly meaningfully advantaged would be relatively rare (see also *R v NS*, 2012 SCC 72 [*R v NS*] at paras 98–102 (Abella J, dissenting)).

[93] I agree with the interveners that the record before the RAD should, in most cases, fully disclose the information on which the RPD based its findings and permit the RAD to review them on a correctness basis. In my view, anything less would be inconsistent with the RPD's duty to make its credibility findings in clear and unmistakeable terms (*Hilo v Canada (Employment & Immigration)*, [1991] FCJ No 228 (Federal Court of Canada – Appeal Division) at para 6). Further, as a consequence of this duty, the RPD ends up creating a record that is commensurate with the RAD's robust appellate role.

[94] Of course, this also assumes that the RPD can, on occasion, reasonably make a credibility finding based on information to which the RAD would not have access on appeal. CARL/CCR

dispute this and argue that the RAD is always in as good a position to make factual findings as the RPD.

[95] In this regard, CARL/CCR argue that information that a witness intends to convey must always be put into the record by the RPD. For instance, they cite the possibility of using a video of a witness performing a religious exercise, or a precise description of a questionable conduct issue, such as looking to counsel for answers when asked a question.

[96] In short, CARL/CCR contend that to the extent the record is deficient, whether by way of non-verbal or physical cues that raise doubts and lead to negative credibility findings, these should be explained clearly and in unmistakeable terms by the decision-maker, who must ensure that the record is clear.

[97] In any event, CARL/CCR argue that demeanour can never reasonably form the basis of a credibility finding. They say that demeanour only has relevance to the fact-finding process to the extent that it facilitates the RPD's inquisitorial function by alerting the RPD to useful lines of questioning and by allowing it to draw out content that can then be seen in the record and reviewed by the RAD.

[98] CARL/CCR further argue that, under IRPA's statutory scheme, the RAD is meant to function as a second risk assessment on the merits of each claim, and that the RAD must do this job even if the evidence before it is imperfect. They note that the RPD makes its findings based

on imperfect evidence, which may include hearsay or affidavits from individuals not subject to cross-examination.

[99] I do not find this comparison useful. The RAD does not perform a *de novo* review but is constrained by the record before it and its appellate function (*Huruglica* at paras 79, 103). Rather, I agree with the Applicants that because it is not the RAD's role to carry out a *de novo* consideration of the claim, the RAD is tethered to the RPD's decision (see, for instance, *Canada (Public Safety and Emergency Preparedness) v Gebrewold*, 2018 FC 374 at para 25).

[100] Like CARL/CCR, AQAADI also argues strongly against the relevance of demeanour evidence, referring the Court to cases that have expressed serious concerns regarding its use (including *R v Rhayel*, 2015 ONCA 377 at paras 85–89; *R v L(L)*, 2016 QCCA 1367 at paras 88–90; *R v Pelletier*, 1995 ABCA 128 at para 18). In fact, AQAADI states that in their research they could not find one RAD case where demeanour was the determinative reason for credibility concerns.

[101] However, AQAADI would not close the door to the possibility that the RPD may, in some cases, have a meaningful advantage. As a result, AQAADI stresses that the meaningful advantage inquiry must be properly undertaken in every case.

[102] The Minister counters that, while demeanour evidence has its shortcomings, its use remains permissible under Canadian law (see *R v RD*, 2016 ONCA 574 at para 25). The

Minister argues that fact-finding is not a science but rather a difficult and complex process to which demeanour has some relevance, referring to the following extract from *R v NS*:

> [26] Changes in a witness's demeanour can be highly instructive; in *Police v. Razamjoo*, [2005] D.C.R. 408, a New Zealand judge asked to decide whether witnesses could testify wearing burkas commented:
>
> > . . . there are types of situations . . . in which the demeanour of a witness undergoes a quite dramatic change in the course of his evidence. The look which says "I hoped not to be asked that question", sometimes even a look of downright hatred at counsel by a witness who obviously senses he is getting trapped, can be expressive. So too can abrupt changes in mode of speaking, facial expression or body language. The witness who moves from expressing himself calmly to an excited gabble; the witness who from speaking clearly with good eye contact becomes hesitant and starts looking at his feet; the witness who at a particular point becomes flustered and sweaty, all provide examples of circumstances which, despite cultural and language barriers, convey, at least in part by his facial expression, a message touching credibility. [para. 78]
>
> [27] On the record before us, I conclude that there is a strong connection between the ability to see the face of a witness and a fair trial. Being able to see the face of a witness is not the only — or indeed perhaps the most important — factor in cross-examination or accurate credibility assessment. But its importance is too deeply rooted in our criminal justice system to be set aside absent compelling evidence.

[103] I have been urged by the interveners to distinguish this body of case law, owing to the unique context of refugee determinations. I am indeed mindful of studies and literature that give pause about, as well as rationale to rethink, the basis of credibility determinations, including the work of Professor Hilary Cameron-Evans in her recently published book *Refugee Law's Fact-*

Finding Crisis: Truth, Risk and Wrong Mistake, (Cambridge, UK: Cambridge University Press, 2018).

[104] However, I have not been persuaded to depart from the views of higher courts as well as a long line of jurisprudence from my Federal Court colleagues, that seeing and hearing a witness may confer a fact-finding advantage to the RPD (see, for instance, *Paye v Canada (Citizenship and Immigration)*, 2017 FC 685 at para 14 with respect to the RAD and *Rahal v Canada (Citizenship and Immigration)*, 2012 FC 319 at paras 41–45). This type of thinking is reasonable and underpins deference to factual findings in other areas of law.

[105] The RAD majority clearly had concerns about its inability to truly review, on a correctness standard, findings based on the RPD's proximity to a witness, and elements that could not be translated into the record. What was not reasonable for the RAD majority, however, was to give no guidance on how this factor should be considered under the categories they discuss. Matters simply relating to oral testimony cannot suffice as a reason for deference. Rather, the relevant factors must relate to oral testimony and be incapable of being captured in the record before the RAD. Only then could it be said that the RPD had a meaningful advantage over the RAD.

[106] Instead of explaining this divide, and analyzing when having heard oral testimony confers a meaningful advantage, the RAD majority seems to reason that having heard oral testimony in and of itself confers a meaningful advantage. In the end, this begs the question of when the RPD enjoyed a meaningful advantage, because that tribunal always hears oral

testimony. In other words, the RPD always has a general advantage. The key question is, therefore, when that advantage becomes particular or specific to the oral testimony. Only then would it become a meaningful advantage, such that deference to the RPD is owed.

Conclusion on Question (ii)

[107] The RAD majority erred in failing to outline for future panels when the RPD's general fact-finding advantage becomes a specific, meaningful advantage, which in turn would justify the application of a deferential standard of review. In my view, the divergence in subsequent RAD cases on this question, as pointed out above, is reflective of the deficiencies in the RAD majority's model that make its Decision unreasonable.

Question (iii): What deference should look like

[108] In *Khosa*, the Supreme Court of Canada observed that, although most statutes identify the grounds of judicial review, only some statutes specify the applicable standard of review and fewer define the content of the specified standard (at para 50). That indeed is the case here. The RAD reasonably found that, while IRPA allows for two standards of review, the meaning of the deferential standard is neither specified in the legislation nor by the Federal Court of Appeal in *Huruglica*. Rather, the Federal Court of Appeal left the responsibility of interpreting the concept of deference up to the RAD. Thus, the final question before me is whether the RAD drew reasonable conclusions on the content of its deferential standard.

[109] The parties to this application have made arguments about the various ways that deference *vis-à-vis* the RAD and the RPD find expression in the statutory scheme. For instance, the Applicants have argued that IRPA integrates institutional deference, because a claimant cannot appeal to the RAD if the RPD finds their claim to be manifestly unfounded (IRPA, s 107.1) or to have no credible basis (IRPA, section 107(2)). CARL/CCR, on the other hand, have focused on the idea of remedial deference. Remedial deference occurs when the RAD remits a matter to the RPD instead of substituting its own determination of the outcome of the refugee claim.

[110] While I agree that these are both forms of deference, broadly construed, they do not assist in the real issue that was before the RAD — namely, how the RAD is supposed to tell if a specific credibility finding made by the RPD can stand.

The RAD Decision on Question (iii)

[111] In its analysis, the RAD was confronted with case law taking different positions on this issue. For instance, the RAD majority referred to cases pre-dating *Huruglica,* where the Federal Court found that it was an error for the RAD to use a reasonableness standard when reviewing the RPD's credibility findings (see, for instance, *Khachatourian v Canada (Citizenship and Immigration)*, 2015 FC 182 at paras 30–31). But the RAD also referred to decisions of this Court post-dating *Huruglica*, which held that the RAD should use a reasonableness standard in such circumstances (*Al Moussawi v Canada (Citizenship and Immigration)*, 2017 FC 441 at para 16; *Sinnaraja v Canada (Citizenship and Immigration)*, 2016 FC 778 at para 23).

[112] The RAD majority concluded that the level of deference to be shown to the RPD's credibility findings was not the same as that owed on judicial review because, even where deference was warranted, the RAD still had to independently review the evidence on which the finding was based. In other words, the RAD majority held that a reasonableness type of review was appropriate so long as the RAD also engaged in an independent analysis of the evidence.

[113] Specifically, the RAD majority settled on a standard of RAD reasonableness, where the RPD enjoyed a meaningful advantage in making a credibility finding. The RAD majority said that, although RAD reasonableness was not the same as the judicial review reasonableness standard, it would still rely on the jurisprudence explaining and defining reasonableness in the context of judicial review.

[114] The RAD majority turned to *Dunsmuir* in concluding that it should assess both process and outcome. That is to say, the RPD's finding would stand if it was the result of a comprehensible reasoning process, meaning that the RAD could read the RPD's conclusion and understand how it was reached, and its outcome was supported by the evidence.

[115] The RAD majority's view made it implicit that a reasonableness type of standard of review could be used if the RAD also conducted an independent assessment of the matter before it.

Parties' Positions on Question (iii)

[116] The Applicants argue that RAD reasonableness, the RAD's concept of deference, is unreasonable because it results in a duplication of the *Dunsmuir* framework at the administrative level. They say that this is contrary to *Huruglica* in which the Federal Court of Appeal held that the RAD is "not to review RPD decisions in the manner of a judicial review" (at para 37).

[117] The Applicants argue that the RAD majority's approach results in a situation of "double deference" as termed by Professor Daly in *"Les appels administratifs au Canada"* (2015) 93 Can Bar Rev 71 [*Les appels*] at 84. Double deference refers to the Federal Court being tasked with reviewing the reasonableness of the RAD's own reasonableness analysis.

[118] Accordingly, the Applicants argue that any expression of deference by the RAD should be less than in a reasonableness review and should not use the language of judicial review. They submit that no other result can be supported by the statutory scheme as set out by IRPA.

[119] The Applicants also rely on Professor Daly's analysis that the RAD is not a typical, generalist appeal tribunal, lacking the specialized expertise of the lower tribunal, but is rather a highly specialized tribunal itself (*Les appels* at 75–76).

[120] The Minister argues that RAD reasonableness is sufficiently distinct from judicial review because the RAD must begin with an overall, independent assessment of the matter before it, while judicial review focuses on the decision-maker's reasons. RAD reasonableness, according

to the Minister, is simply a term used by the RAD, with built-in flexibility that is both appropriate to the level of deference that the RAD should give to the RPD, and is thus reasonable.

[121] CARL/CCR argue that the RAD cannot independently assess the basis for a particular finding, while simultaneously reviewing it on a deferential standard. In their view, this exposes a fundamental and irreconcilable tension between the idea of a deferential review standard and the RAD's duty to conduct an independent assessment. CARL/CCR say that this tension is also apparent in the reasoning of the RAD minority where the single member warned:

> [155] Determining the degree of deference is a risky topic. If I were to qualify the RAD's standard of review when it examines the RPD's credibility findings, I would say that it should not be a standard that limits its authority to intervene. Despite the RPD's advantageous position in some cases, the RAD's approach involves taking a step back in order to better proceed with an independent and careful analysis of the evidence before it in an effort to determine whether the RPD committed an error warranting the RAD's intervention.

Analysis on Question (iii)

[122] The RAD's obligation to undertake an independent assessment bears further comment. In *Huruglica*, the Federal Court of Appeal did not specifically use the language of independent assessment. Nevertheless, subsequent cases have held that *Huruglica* endorsed a thorough, comprehensive, and independent review by the RAD (see, for instance, *Gabila v Canada (Citizenship and Immigration)*, 2016 FC 574 at para 20; *Marin v Canada (Citizenship and Immigration)*, 2016 FC 847 at paras 32–33).

[123] It would seem, then, that an independent assessment could be seen as being antithetical to reasonableness review, and thus synonymous with correctness review (see *Taqadees v Canada (Citizenship and Immigration)*, 2016 FC 1072 at para 10; *Daniel v Canada (Citizenship and Immigration)*, 2016 FC 1049 at paras 11–12; *Kayitankore v Canada (Citizenship and Immigration)*, 2016 FC 1030 at para 23).

[124] I agree with CARL/CCR that, if an independent assessment is understood as equating to correctness, the RAD majority could not reasonably marry this concept with deference. But this Court has also held that even a deferential review by the RAD involves an independent assessment of the evidence (see *Guo v Canada (Citizenship and Immigration)*, 2017 FC 317 at paras 15–19; *Jeyaseelan v Canada (Citizenship and Immigration)*, 2017 FC 278 at paras 19–21).

[125] What I take from the above case law is that, for most of the RPD's findings, the RAD is required to conduct a correctness review and substitute its own conclusions where they differ from those of the RPD. But even for those findings that attract a deferential review, an independent assessment of some form is also needed. Deference never equates to blind endorsement (see *Dunsmuir* at para 48).

[126] In brief, after considering the RAD majority's rationale, I do not find that their RAD reasonableness standard is distinguishable from the reasonableness standard used on judicial review merely because it necessitates an independent assessment.

[127] I now turn to the Minister's other arguments. It is his position that there was no error in the RAD majority using the term reasonableness, as this is just a label that describes a level of deference and it can be used outside of the judicial review context. The Minister also argues that the RAD majority used the term reasonableness flexibly to fit the RAD's particular context.

[128] I think it is obvious here that, regardless of the label it chose, the content of the deferential standard adopted by the RAD majority is duplicative of the framework to be applied on judicial review. Indeed, Professor Daly observed as much in a recent commentary on the RAD majority's Decision, writing that the RAD reasonableness test developed in the majority Decision is difficult to distinguish from the test set out by the Supreme Court in *Newfoundland and Labrador Nurses' Union v Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62 and *Agraira v Canada (Public Safety and Emergency Preparedness)*, 2013 SCC 36 (see Paul Daly, "Effective Administrative Appeals (Again): Re X, 2017 CanLII 33034 (CA IRB)" (16 July 2018), online (blog): *Administrative Law Matters*, www.administrativelawmatters.com).

[129] Furthermore, the RAD majority acknowledged that it was adopting a judicial review standard for its own purposes when it wrote that it would "assess reasonableness in the context of its particular role while attempting to avoid the development of a new gradation of that standard" (RAD Decision at para 70).

[130] In my view, the RAD majority's conclusions on the content of its deferential standard are not consistent with the Federal Court of Appeal's instructions that the RAD is not to review RPD decisions in the manner of a judicial review (*Huruglica* at paras 37, 47–48).

[131] I recognize that it is a great challenge for the RAD to give content to the concept of deference in practical terms for its own purposes. Indeed, it has not been an easy task for the courts to do so in the context of judicial review. Nonetheless, I find that the RAD majority's explanation of RAD reasonableness only duplicates the task of a court on judicial review and, therefore, falls outside of the range of outcomes reasonably available to it.

[132] It is not my role to set out what the content of the RAD's deferential standard should be. However, I observe that the RAD may have greater success in developing a RAD-specific standard of deferential review if it first clearly identifies the conditions triggering deference — namely, what it means, in a concrete sense, for the RPD to have had a meaningful advantage in making a particular credibility finding. This ties directly into my comments regarding Question (ii) above.

[133] More importantly, the content of the RAD's deferential standard must be consistent with and animated by the purposes of its governing legislation (see *Doshi v Canada (Attorney General)*, 2018 FC 710 at paras 75, 80; see also *Workers Comp of PEI v Dyment,* 2016 PECA 10 at para 48). The Minister argued that the RAD majority was not required to select a standard less deferential than that in *Dunsmuir*. I disagree. The Federal Court of Appeal, after reviewing the purposes of the governing legislation, held at paragraph 66 of *Huruglica* that the RAD is a *sui generis* statutory body whose role is to act as a safety net.

[134] Awareness of this point is reflected in the analysis of the RAD minority, which was hesitant to adopt any standard that curtailed the RAD's error-correcting role. In the RAD Decision, the minority member wrote:

> [158] In current decisions of the Federal Court and the Federal Court of Appeal, it is indicated in which types of cases the RPD finds itself in an advantageous position in relation to the RAD and vice versa. For example, the Federal Court states that the RAD is as equally well-placed as the RPD to determine plausibility. The Federal Court also finds that it is appropriate for the RAD to give deference to the RPD regarding the authenticity of a document when the RAD does not have the original documents. That being said, I am also of the opinion that there is no need for me to further discuss situations that may present themselves before the RAD as I fear that talking in generalities or establishing categories could give rise to rigidity where the RAD is concerned. As Justice Gauthier states, the degree of deference owed to the RPD "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".
>
> [Footnotes omitted]

[135] I agree with the Applicants that, called by another name or not, reasonableness review as developed for the judicial review has no application in the RAD context. *Huruglica* later referenced Minister Kenney's promise of a "full, fact-based appeal" (*Huruglica* at para 94). The RAD majority's concept of the RAD reasonableness standard is indistinct from that of *Dunsmuir* in judicial review, and thus ~~of~~ incompatible with a full, fact based appeal.

Conclusion on Question (iii)

[136] I note that the Federal Court of Appeal wrote, "one should always keep in mind that the very first objective of the IRPA (s 3(2)(a)) is to recognize that the refugee program is about

saving lives and offering protection to the displaced and persecuted" (*Huruglica* at para 53). This case, like all refugee cases, impacts real lives. In my view, to be reasonable, a deferential standard selected by the RAD cannot simply duplicate the supervisory role of this Court on judicial review. The RAD reasonableness standard runs the risk of curtailing the opportunity to have flawed credibility determinations corrected.

Issue 2: Were the RAD's Conclusions on the Merits of the Appeal Reasonable?

[137] Given my conclusions on the first issue, it is neither appropriate nor necessary for me to comment on the RAD's Decision insofar as it relates to the merits of the Applicants' appeal. The RAD's Decision will accordingly be sent back to be decided anew by a differently constituted panel.

V. Certified Question

[138] Having regard to the test for certification recently confirmed by the Federal Court of Appeal in *Lunyamila v Canada (Public Safety and Emergency Preparedness)*, 2018 FCA 22, I certify the following three questions:

1) Was it reasonable for the RAD to conclude that, under IRPA, some of the RPD's findings are reviewable by it on a deferential (i.e. non-correctness) standard?

2) Was it reasonable for the RAD to conclude that the deferential standard applies where the RPD had a meaningful advantage in making the finding under review, and, if so, did the RAD articulate a reasonable framework for identifying such an advantage?

3) Was it reasonable for the RAD to adopt a deferential standard of RAD reasonableness, under which the RPD's findings will be deferred to where the RAD can understand how they were reached, and where they were based on evidence in the record?

[139] These three questions track the legal questions raised and are dispositive of these Reasons, in that they arise from the case itself rather than the way in which I disposed of the application. The three issues also raise issues of broad significance and general importance, transcending the interests of the parties (*Lewis v Canada (Public Safety and Emergency Preparedness)*, 2017 FCA 130 at para 36).

[140] I note that while the interveners had originally sought a right of appeal in respect of this judgment (see *Rozas del Solar v Canada (Citizenship and Immigration)*, 2018 FC 156 at para 31), they abandoned this request at the hearing of this application.

VI. Conclusion

[141] The application for judicial review is allowed. Three questions are certified in accordance with these Reasons. I wish to thank all counsel for their excellent submissions, which were of great assistance to the Court.

JUDGMENT in IMM-2645-17

THIS COURT'S JUDGMENT is that:

1. This application for judicial review is allowed. The matter will be sent back for redetermination by a different panel.
2. The following questions are certified:
   i. Was it reasonable for the RAD to conclude that, under IRPA, some of the RPD's findings are reviewable by it on a deferential (i.e. non-correctness) standard?

   ii. Was it reasonable for the RAD to conclude that the deferential standard applies where the RPD had a meaningful advantage in making the finding under review, and, if so, did the RAD articulate a reasonable framework for identifying such an advantage?

   iii. Was it reasonable for the RAD to adopt a deferential standard of RAD reasonableness, under which the RPD's findings will be deferred to where the RAD can understand how they were reached, and where they were based on evidence in the record?
3. No costs are ordered.

"Alan S. Diner"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-2645-17
STYLE OF CAUSE:	ROZAS DEL SOLAR, PAOLA, ET AL v THE MINISTER OF CITIZENSHIP AND IMMIGRATION AND THE CANADIAN ASSOCIATION OF REFUGEE LAWERS, THE CANADIAN COUNCIL FOR REFUGEES, AND L'ASSOCIATION QUÉBÉCOISE DES AVOCATS ET AVOCATES EN DROIT DE L'IMMIGRATION
PLACE OF HEARING:	TORONTO, ONTARIO
DATE OF HEARING:	MAY 28, 2018
JUDGMENT AND REASONS:	DINER J.
DATED:	NOVEMBER 14, 2018
AMENDED:	December 28, 2018

APPEARANCES:

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James Todd Amy King	FOR THE RESPONDENT
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Anthony Navaneelan	FOR THE INTERVENER ~~THE CANADIAN COUNCIL FOR REFUGEES~~ THE CANADIAN ASSOCIATION OF REFUGEE LAWYERS
Stéphanie Valois Guillaume ~~Cliché~~ Cliche-Rivard	FOR THE INTERVENER L'ASSOCIATION QUÉBÉCOISE DES AVOCATS ET AVOCATES EN DROIT DE L'IMMIGRATION

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