Federal Court  Cour fédérale

**Date: 20150717**

**Docket: IMM-6829-14**

**Citation: 2015 FC 878**

**Ottawa, Ontario, July 17, 2015**

**PRESENT: The Honourable Mr. Justice Locke**

**BETWEEN:**

**MOHAMED ZAYAN NIYAS**

**Applicant**

**and**

**THE MINISTER OF CITIZENSHIP AND IMMIGRATION**

**Respondent**

## JUDGMENT AND REASONS

I. Nature of the Matter

[1] This is a judicial review pursuant to subsection 72(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA] of the September 9, 2014, decision of the Refugee Appeal Division (RAD) of the Immigration and Refugee Board of Canada (IRB) wherein the RAD confirmed the decision of the Refugee Protection Division (RPD) that the applicant is neither a Convention refugee nor a person in need of protection pursuant to sections 96 and 97 of IRPA.

II. Facts

[2] The applicant is a citizen of Sri Lanka from the city of Colombo who alleged before the IRB that he fears the authorities of his country due to: (i) his membership in a political party called the National Unity Alliance (NUA), (ii) his Muslim faith, and (iii) his perceived connection to the Liberation Tigers of Tamil Eelam (LTTE). The applicant alleges that he was targeted by Bodu Bala Sena (BBS), which is a radical anti-Muslim movement. The applicant's brother also made a claim for refugee protection in Canada in September 2008. His claim was rejected by the RPD with the applicant's claim.

[3] The applicant alleges that while he was in his father's store, a member of the BBS told him that Sri Lanka belonged to the Sinhalese ethnic majority, and warned him to close the business or they would teach him a lesson.

[4] The applicant alleges that his family had problems with the police in Colombo for their perceived association with the LTTE. The authorities came to the applicant's family home, questioned him and his family, and searched the premises to determine whether they were helping the LTTE.

[5] In October 2011, the authorities questioned the applicant's father about the applicant's brother's involvement in supporting the Tamil diaspora in Toronto.

[6] The applicant also alleges that he received threatening phone calls accusing him of being an LTTE supporter after he attended meetings held in Colombo by the NUA.

[7] The applicant alleges that in April 2013, he was arrested, detained, and beaten by the authorities for his connection with the LTTE and the NUA. After two days, he was released with a warning that he would not be released if arrested a second time.

[8] The applicant left Sri Lanka for the United States shortly thereafter.

[9] In October 2013, members of the police intelligence as well as two presumed members of the BBS allegedly came to the applicant's house. After the applicant's mother informed them that the applicant had left for the United States, they told her that the applicant was to report to the police as soon as he returned to Sri Lanka.

[10] Later that month, with the assistance of a smuggler, the applicant crossed from the United States to Canada (where his brother was) and claimed refugee protection.

## III. Decision

### A. *The RPD's decision*

[11] For the following reasons, the RPD found that the determinative issues were the applicant's lack of credibility and his lack of subjective fear:

1. Regarding the threatening phone calls, the applicant first testified that he could not remember when they began, but later modified his testimony by stating that they began around March 15, 2013. He also testified initially that the first call was a couple of days after he became a member of the NUA, though he later said the first call was about a week after joining the NUA.

2. The applicant's testimony with respect to the threatening phone calls was inconsistent with his Personal Information Form (PIF). The applicant wrote in his PIF that he received threatening phone calls because of his perceived association with the LTTE and his attendance at meetings held by the NUA. However, he failed to include these reasons in his testimony. There, he cited instead objections to his business being operated by Muslims. The applicant did not mention in his PIF that the callers threatened his business.

3. The applicant's testimony as regards the alleged two days of detention was incomplete when compared to his PIF. The applicant did not mention in his oral testimony that the authorities warned him during his detention that they had specific information concerning his involvement with helping members of the LTTE to hide from the authorities after the war.

4. The applicant stayed in the United States for approximately six months before making his refugee claim, and then went to Canada to make the claim.

5. The applicant testified that he hired a smuggler to get across the border from the United States to Canada because he did not know how to claim refugee protection in Canada. However, the applicant knew how to find immigration related information, having applied for a Canadian student visa twice before (in September 2012, and December 2012), and he could have spoken with his brother who had been in Canada since 2008.

6. The applicant's allegation that he left his passport with the smuggler was implausible because the passport was not used to cross the border.

7. The applicant's applications for student visas in 2012 indicated a pre-existing motivation to come to Canada.

8. The applicant failed to provide adequate documentation to corroborate his allegations. The applicant failed to provide a letter from his father who was aware of the events alleged by the applicant. Moreover, a letter from Azath Zally, the leader of the NUA who knew the applicant personally, was generic and did not confirm the specific details alleged by the applicant. Similarly, a letter from a Member of the Sri Lankan parliament submitted to confirm the applicant's allegations provided no details about his father's situation.

9. The applicant knew very little about the threats against his father.

10. The applicant would only face a generalized risk as a Muslim in Sri Lanka. The assumption that the claimant may be subject to an attack is speculative.

B. *The RAD's decision*

(1) Consideration of the new evidence

[12] In his application, the applicant submitted: (i) a letter from his father dated April 20, 2014, and (ii) a US Department of State report outlining the situation for Muslims in Sri Lanka since the RPD's decision.

[13] After perfection of his application, the applicant made two applications to file additional evidence late. The first such application, dated May 25, 2014, concerned a copy of the April 20, 2014 letter from the applicant's father, this one dated April 29, 2014, and bearing a company stamp. The second application to file additional evidence late was dated July 8, 2014. It sought to add (i) another letter from the applicant's father (dated June 13, 2014) concerning a March 20, 2014 incident; (ii) a letter from the applicant's father's lawyer dated June 24, 2014; and (iii) additional documentary evidence concerning conditions in Sri Lanka.

[14] The RAD denied the first application (dated May 25, 2014) because the explanation for the delay in filing the letter from the applicant's father was lacking in details and supporting documentation. The RAD was not satisfied that the letter could not, with reasonable effort, have been provided with the applicant's record. The RAD also noted that the letter was not provided in the form of an affidavit or statutory declaration as required by subsection 37(4) of the *Refugee Appeal Division Rules* (SOR/2012-257) [*Rules*].

[15] The RAD denied the applicant's second application to file late (dated July 8, 2014) for similar reasons. The RAD also noted that the June 13, 2014 letter from the applicant's father was not relevant.

[16] The RAD then considered the new documents that were submitted on time: the April 20, 2014 letter from the applicant's father, and the US Department of State report. In rejecting these documents, the RAD applied subsection 110(4) of IRPA and the factors established in *Raza v Canada (Citizenship and Immigration)*, 2007 FCA 385 at para 13 [*Raza*] that pertain to the

admission of new evidence in the context of a Pre-Removal Risk Assessment (PRRA) application:

> [13] As I read paragraph 113(*a*), it is based on the premise that a negative refugee determination by the RPD must be respected by the PRRA officer, unless there is new evidence of facts that might have affected the outcome of the RPD hearing if the evidence had been presented to the RPD. Paragraph 113(*a*) asks a number of questions, some expressly and some by necessary implication, about the proposed new evidence. I summarize those questions as follows:
>
> 1. Credibility: Is the evidence credible, considering its source and the circumstances in which it came into existence? If not, the evidence need not be considered.
>
> 2. Relevance: Is the evidence relevant to the PRRA application, in the sense that it is capable of proving or disproving a fact that is relevant to the claim for protection? If not, the evidence need not be considered.
>
> 3. Newness: Is the evidence new in the sense that it is capable of:
>
> (a) proving the current state of affairs in the country of removal or an event that occurred or a circumstance that arose after the hearing in the RPD, or
>
> (b) proving a fact that was unknown to the refugee claimant at the time of the RPD hearing, or
>
> (c) contradicting a finding of fact by the RPD (including a credibility finding)?
>
> If not, the evidence need not be considered.
>
> 4. Materiality: Is the evidence material, in the sense that the refugee claim probably would have succeeded if the evidence had been made available to the RPD? If not, the evidence need not be considered.
>
> 5. Express statutory conditions:
>
> (a) If the evidence is capable of proving only an event that occurred or circumstances that arose prior to the RPD hearing, then has the applicant established either that the evidence was not reasonably available to him or her for presentation at the RPD

> hearing, or that he or she could not reasonably have been expected in the circumstances to have presented the evidence at the RPD hearing? If not, the evidence need not be considered.
>
> (a) If the evidence is capable of proving an event that occurred or circumstances that arose after the RPD hearing, then the evidence must be considered (unless it is rejected because it is not credible, not relevant, not new or not material).

[17] Just as per the RAD's conclusion with regard to the April 29, 2014 version of the applicant's father's letter, the RAD was not satisfied that the April 20 version could not have been provided in the form of an affidavit or a statutory declaration.

[18] The RAD rejected the US Department of State report on the basis that it fails the newness test in *Raza*.

(2) Merits of the appeal

[19] The RAD followed the decision of Justice Phelan in *Huruglica v Canada (Citizenship and Immigration)*, 2014 FC 799 [*Huruglica*] as regards its standard of review of the RPD's decision. It acknowledged that it was obliged to conduct its own independent analysis of the evidence, but must "show deference to RPD credibility findings and findings in areas where the RPD has a particular advantage (over the RAD)."

[20] The RAD confirmed that the RPD did not err in making the adverse credibility findings mentioned above. It also expressed scepticism that the applicant's father could not write a letter or an affidavit about the problems faced by his son in Sri Lanka, but could make the arrangements to have a smuggler help his son cross the border from the United States to Canada.

## IV. Issues

[21] This matter raises the following issues:

1. Did the RAD err in assessing the admissibility of new evidence?
2. Did the RAD err in confirming that the applicant is not credible?

## V. Analysis

### A. *Standard of review*

#### (1) The RAD's standard of review

[22] The parties did not take issue with the RAD's reliance on *Huruglica* to determine the standard of review it should apply to the RPD's decision. The disagreement between the parties comes on the question of whether the RAD correctly applied *Huruglica*. The applicant accepts that the RAD owes deference to the RPD on issues of credibility, but argues that the RAD wrongly applied a reasonableness standard of review (which is particular to judicial reviews), and further that several of the RPD's conclusions that were found by the RAD to be reasonable were not.

#### (2) The Court's standard of review

[23] This Court applies a standard of reasonableness in reviewing the RAD's decision with respect to the RPD's credibility findings: *Ching v Canada (Citizenship and Immigration)*, 2015 FC 725 at para 45 [*Ching*]. That standard of reasonableness also applies to the admissibility of

new evidence: *Ching* at para 46; *Singh v Canada (Citizenship and Immigration)*, 2014 FC 1022 at paras 36 to 42 [*Singh*].

B. *Admission of new evidence*

[24] The applicant argues that the *Raza* factors should not be applied to the admission of new evidence by the RAD. The respondent argues that although this Court cautioned against the direct importation of *Raza* into the RAD context in an inflexible manner (*Singh*), there are no indications that the RAD did this in the present case.

[25] There is some debate within this Court as regards the application of the *Raza* factors to the RAD. Justice Gagné, Justice Noël, and Justice Fothergill have considered that the *Raza* test should not automatically apply to a determination under subsection 110(4) of IRPA: *Singh* at paras 44 to 58; *Khachatourian v Canada (Citizenship and Immigration)*, 2015 FC 182 at para 37 [*Khachatourian*]; *Ngandu v Canada (Citizenship and Immigration)*, 2015 FC 423 at paras 14 to 22 [*Ngandu*]. The grounds for this position are that: (i) a Pre-removal Risk Assessment (PRRA) Officer does not have an appeal role with regard to RPD decisions and does not have a quasi-judicial function as does the RAD: *Singh* at paras 49 and 50; *Khachatourian* at para 37; *Ngandu* at para 20, (ii) the purpose of creating the RAD was to give a "full-fact based appeal": *Singh* at para 54; *Khachatourian* at para 37, and (iii) the factors regarding the admissibility of evidence must be sufficiently flexible given the strict timelines a claimant now faces for submitting evidence before the RPD: *Singh* at para 55; *Khachatourian* at para 37. In paragraphs 55 and 56 of *Singh*, Justice Gagné stated:

> A claimant now has 50 days to present all documents from the date he or she made the claim; the previous legislative scheme required the documents 20 days prior to a hearing, which, on average, took much longer to take place. When the RPD confronts a claimant on the weakness of his evidentiary record, the RAD should, in subsequent review of the decision, have some leeway in order to allow the claimant to respond to the deficiencies raised.
>
> But there is more. In *Raza*, Justice Sharlow distinguishes between the express and the implicit questions raised by paragraph 113(*a*) of the Act and specifically states that the four implied questions (credibility, relevance, newness and materiality) find their source in the purpose of paragraph 113(*a*) within the statutory scheme of the Act relating to refugee claims and PRRA applications. In my view, they need to be addressed in that specific context and are not transferable in the context of an appeal before the RAD.
>
> [Emphasis added]

[26] However, in *Denbel v Canada (Citizenship and Immigration)*, 2015 FC 629 at paras 42 and 43 [*Denbel*], Justice Mosley emphasized that section 113(a) of IRPA (which applies to PRRAs) and subsection 110(4) of IRPA (which applies to the RAD) "contain virtually identical language" which would mean that the "Parliament intended these two provisions to enshrine the same legal test."

[27] I agree with Justice Gagné and Justice Noël that the purpose of creating the RAD was to give a "full-fact based appeal". However, it is also true that that sections 113(a) and 110(4) of IRPA "contain virtually identical language". I am mindful that "where words in a statute have received a judicial construction and the legislature has repeated them without alteration […], the legislature must be taken to have used them in the sense in which they have been construed by the court": Elmer A. Driedger, *Construction of Statutes*, 2d ed (Toronto: Butterwoths, 1983) at p 125. Justice Kane's decision in *Ching* at para 58 seems to reconcile these two positions: "If the

RAD refers to *Raza* for guidance, given the analogous wording of the provisions, the RAD must consider how those factors should be adapted to the context of new evidence submitted on an appeal of specific issues." Hence, the factors in *Raza* are useful guidance, which should however be considered with a view of fostering the applicant's right to a "full-fact based appeal".

[28] In the present case, I am satisfied that the RAD's reliance on *Raza* to reject a US Department of State report did not impugn the applicant's right to a complete assessment of the facts of his case. Having read this report, I do not believe it would have altered the core of the RAD's decision, which concerns mainly the credibility of the applicant. Moreover, the RAD did not apply the *Raza* factors strictly in rejecting US Department of State report. Rather, the RAD stated that the *Raza* factors are "relevant". In addition, the RAD decision reveals that the application of the *Raza* factors was not determinative as regards the rejection of the June 13, 2014 letter from the applicant's father. The RAD reasonably concluded that the questions from the police that were described in the letter were not relevant to the applicant. The fact that the police were given the applicant's telephone number but apparently never attempted to contact him supports this view.

[29] The applicant also argues that the RAD put form over the substance in finding that the letter from the applicant's father was not admissible under subsection 37(4) of the *Rules* because it was not an affidavit. The applicant asserts that the failure to respect section 37 of the *Rules* does not render the application for new evidence invalid: section 54 of the *Rules*.

[30] In my view, section 54 of the *Rules* does not prohibit the RAD from applying subsection 37(4) in the present circumstances. The RAD reasonably rejected the letter from the applicant's father on the basis that the applicant's explanation for its delay and its form was inadequate. My view on this issue is unchanged despite the apparent confusion as to who's sick father-in-law was cited as excusing the delay in filing the letter.

[31] I take this opportunity to note that the applicant has indicated that he is not pursuing the argument that section 37 of the *Rules* is *ultra vires*.

C. *The applicant's credibility*

[32] The applicant notes correctly that, in several places in its decision, the RAD appears to apply a standard of reasonableness to its review of the RPD's conclusions. The applicant correctly argues that the reasonableness standard of review is applicable to a judicial review and is not the correct standard to apply in an appeal to the RAD from a decision of the RPD.

[33] However, the RAD clearly stated twice in its decision that, in its review of the RPD's decision, it was guided by *Huruglica*. Moreover, the critical findings by the RPD were based on testimony from the applicant and were therefore entitled to deference when reviewed by the RAD.

[34] Though I agree that the standard of reasonableness is not technically applicable in the RAD's review, and references in its decision to that standard were ill-advised, the deference by

the RAD to the RPD's conclusions was appropriate. Any incorrect terminology used by the RAD did not affect the result.

[35] The applicant objects to the RAD's acceptance of the negative inference drawn by the RPD from the modification of the applicant's testimony concerning the timing of the first threatening phone calls he received in Sri Lanka. Initially, he indicated that he could not remember when the phone calls began, but later indicated that the first call happened around March 15, 2013. Also, the applicant initially testified that the first phone call came a couple of days after he became a member of the NUA, though he later indicated that the first call came about a week after he joined the party. Even though these discrepancies may seem minor, the RPD appeared to understand the evidence and gave reasons for its conclusion. The RAD was entitled to defer to those reasons.

[36] The applicant also objects to the RPD's conclusion, supported by the RAD, that it was implausible that the smuggler who was hired to get the applicant across the border from the United States to Canada would take the applicant's passport which was not even used in the crossing. The applicant cites authorities to the effect that conclusions of implausibility should be reached only in clear cases. In my view, and in the light of the totality of the evidence, it was reasonably open to the RAD to support the RPD's conclusion of implausibility.

[37] The applicant also takes issue with the finding that the applicant's delay in seeking asylum (he waited six months after arriving in the United States, and then travelled to Canada to

seek asylum) indicated an absence of subjective fear. I have heard nothing to convince me that the RAD's analysis of this issue was unreasonable.

[38] Finally, the applicant argues that the RAD erred in failing to consider the applicant's risk in Sri Lanka as a Muslim. The applicant argues that, even if the RAD was correct in excluding new evidence because it was not supported by affidavit, the same could not be true of a new argument. The applicant argues that the RAD was obliged to consider whether the existing evidence indicated that the applicant would be at risk in Sri Lanka as a Muslim. I am unwilling to accept an argument by the applicant that the RAD's silence on this issue indicates that it was not adequately considered by the RAD, when the applicant himself was likewise silent on the issue.

## VI. Conclusions

[39] In my view, the applicant for judicial review should be dismissed.

[40] Because this decision is not dependent on the RAD's application of the *Raza* factors in the case of an appeal to the RAD, I will not certify the question proposed by the applicant.

## JUDGMENT

**THIS COURT'S JUDGMENT is that**:

1. The application for judicial review is dismissed;

2. No serious question of general importance is certified for appeal.

"George R. Locke"
Judge

**FEDERAL COURT**

**SOLICITORS OF RECORD**

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| **DOCKET:** | IMM-6829-14 |
| **STYLE OF CAUSE:** | MOHAMED ZAYAN NIYAS v THE MINISTER OF CITIZENSHIP AND IMMIGRATION |
| **PLACE OF HEARING:** | TORONTO, ONTARIO |
| **DATE OF HEARING:** | JULY 2, 2015 |
| **JUDGMENT AND REASONS:** | LOCKE J. |
| **DATED:** | JULY 17, 2015 |

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