Federal Court  Cour fédérale

Date: 20141015

Docket: IMM-5981-13

Citation: 2014 FC 975

[UNREVISED ENGLISH CERTIFIED TRANSLATION]

Ottawa, Ontario, October 15, 2014

PRESENT: The Honourable Mr. Justice Shore

BETWEEN:

OLEG TRIASTCIN

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Introduction

[1] This is an application for judicial review under subsection 72(1) of the *Immigration and Refugee Protection Act* [IRPA] of a decision dated August 26, 2013, of the Refugee Appeal Division [RAD], wherein it was determined that the applicant was neither a refugee under

section 96 of the IRPA nor a person in need of protection within the meaning of section 97 of the same Act.

[2] The Court concludes that the applicant was not provided with the appropriate basis on which to be heard, thereby warranting that the application be allowed.

II. Facts

[3] In his Basis of Claim form, dated February 25, 2013, the applicant, a 42-year-old Russian citizen, provided the account that follows.

[4] The applicant became a member of the "Other Russia" opposition party following the *Duma* elections in December 2011. The applicant was persecuted by the Russian authorities by reason of his political opinion.

[5] Between March and December 2012, the applicant attended several demonstrations, in particular in the city of Pavlovsk, during which he was beaten by the police on two occasions. On December 15, 2012, at a demonstration organized by the opposition in Moscow, the applicant was arrested and beaten by the police. Following his arrest, the applicant was forced to sign a statement in which he promised not to attend any more demonstrations.

[6] The police then contacted the applicant's employer to inform him of the applicant's participation in the demonstration on December 15, 2012. The applicant was later fired from his job. The only reason given by his employer was that he did not want any "political problems".

[7] Fearing for his life and health, the applicant left Russia, arriving in Canada on February 13, 2013, and claiming refugee protection, which led to a hearing before the Refugee Protection Division [RPD]. In a decision dated May 31, 2013, the RPD rejected the applicant's claim for refugee protection.

III. Decision

[8] In a decision dated August 26, 2013, the RAD upheld the RPD's decision and concluded that the applicant was not a refugee within the meaning of the *United Nations' Convention relating to the Status of Refugees* [the Convention], or a person in need of protection within the meaning of sections 96 and 97 of the IRPA.

[9] First, the RAD concluded that the new evidence submitted by the applicant was inadmissible because the applicant failed to provide detailed submissions about that evidence, as required under rule 3 of the *Refugee Appeal Division Rules*, SOR/2012-257, and because that evidence was deemed to be unreliable.

[10] Second, the RAD concluded that the applicant failed to justify the need to hold a hearing, under subsection 110(6) of the IRPA.

[11] Third, the RAD stated that, as an appeal body, the applicable standard of review for findings of mixed fact and law made by the RPD was reasonableness. Thus, the role of the RAD was to ascertain whether the RPD's findings fell within a range of possible, acceptable outcomes which are defensible in respect of the facts and law. The RAD concluded that the findings made

by the RPD with regard to the applicant's refugee status were reasonable and dismissed the six grounds of appeal raised by the applicant.

IV. Issue

[12] In spite of the arguments of the parties, this application raises a single fundamental issue: Did the RAD properly exercise its appellate role with respect to the RPD and apply the appropriate standard of review to the RPD's findings?

V. Statutory provisions

[13] The following statutory provisions of the IRPA apply to the determination of the applicant's refugee status:

Convention refugee	**Définition de « réfugié »**
96. A Convention refugee is a person who, by reason of a well-founded fear of persecution for reasons of race, religion, nationality, membership in a particular social group or political opinion,	**96**. A qualité de réfugié au sens de la Convention — le réfugié — la personne qui, craignant avec raison d'être persécutée du fait de sa race, de sa religion, de sa nationalité, de son appartenance à un groupe social ou de ses opinions politiques :
(*a*) is outside each of their countries of nationality and is unable or, by reason of that fear, unwilling to avail themself of the protection of each of those countries; or	*a*) soit se trouve hors de tout pays dont elle a la nationalité et ne peut ou, du fait de cette crainte, ne veut se réclamer de la protection de chacun de ces pays;
(*b*) not having a country of nationality, is outside the country of their former	*b*) soit, si elle n'a pas de nationalité et se trouve hors du pays dans lequel elle

habitual residence and is unable or, by reason of that fear, unwilling to return to that country.

avait sa résidence habituelle, ne peut ni, du fait de cette crainte, ne veut y retourner.

Person in need of protection

97. (1) A person in need of protection is a person in Canada whose removal to their country or countries of nationality or, if they do not have a country of nationality, their country of former habitual residence, would subject them personally

Personne à protéger

97. (1) A qualité de personne à protéger la personne qui se trouve au Canada et serait personnellement, par son renvoi vers tout pays dont elle a la nationalité ou, si elle n'a pas de nationalité, dans lequel elle avait sa résidence habituelle, exposée :

(*a*) to a danger, believed on substantial grounds to exist, of torture within the meaning of Article 1 of the Convention Against Torture; or

a) soit au risque, s'il y a des motifs sérieux de le croire, d'être soumise à la torture au sens de l'article premier de la Convention contre la torture;

(*b*) to a risk to their life or to a risk of cruel and unusual treatment or punishment if

b) soit à une menace à sa vie ou au risque de traitements ou peines cruels et inusités dans le cas suivant :

(i) the person is unable or, because of that risk, unwilling to avail themself of the protection of that country,

(i) elle ne peut ou, de ce fait, ne veut se réclamer de la protection de ce pays,

(ii) the risk would be faced by the person in every part of that country and is not faced generally by other individuals in or from that country,

(ii) elle y est exposée en tout lieu de ce pays alors que d'autres personnes originaires de ce pays ou qui s'y trouvent ne le sont généralement pas,

(iii) the risk is not inherent or incidental to lawful sanctions, unless imposed in disregard of accepted international

(iii) la menace ou le risque ne résulte pas de sanctions légitimes — sauf celles infligées au mépris des normes

standards, and	internationales — et inhérents à celles-ci ou occasionnés par elles,
(iv) the risk is not caused by the inability of that country to provide adequate health or medical care.	(iv) la menace ou le risque ne résulte pas de l'incapacité du pays de fournir des soins médicaux ou de santé adéquats.
(2) A person in Canada who is a member of a class of persons prescribed by the regulations as being in need of protection is also a person in need of protection.	(2) A également qualité de personne à protéger la personne qui se trouve au Canada et fait partie d'une catégorie de personnes auxquelles est reconnu par règlement le besoin de protection.

[14] Regarding the RAD's role, the holding of hearings and the admissibility of evidence, the following statutory provisions are relevant:

Appeal	**Appel**
110. (1) Subject to subsections (1.1) and (2), a person or the Minister may appeal, in accordance with the rules of the Board, on a question of law, of fact or of mixed law and fact, to the Refugee Appeal Division against a decision of the Refugee Protection Division to allow or reject the person's claim for refugee protection.	**110**. (1) Sous réserve des paragraphes (1.1) et (2), la personne en cause et le ministre peuvent, conformément aux règles de la Commission, porter en appel — relativement à une question de droit, de fait ou mixte — auprès de la Section d'appel des réfugiés la décision de la Section de la protection des réfugiés accordant ou rejetant la demande d'asile.
Procedure	**Fonctionnement**
(3) Subject to subsections (3.1), (4) and (6), the Refugee Appeal Division must proceed without a hearing, on the basis of the record of the	(3) Sous réserve des paragraphes (3.1), (4) et (6), la section procède sans tenir d'audience en se fondant sur le dossier de la Section de la

proceedings of the Refugee Protection Division, and may accept documentary evidence and written submissions from the Minister and the person who is the subject of the appeal and, in the case of a matter that is conducted before a panel of three members, written submissions from a representative or agent of the United Nations High Commissioner for Refugees and any other person described in the rules of the Board.

Evidence that may be presented

(4) On appeal, the person who is the subject of the appeal may present only evidence that arose after the rejection of their claim or that was not reasonably available, or that the person could not reasonably have been expected in the circumstances to have presented, at the time of the rejection.

Hearing

(6) The Refugee Appeal Division may hold a hearing if, in its opinion, there is documentary evidence referred to in subsection (3)

(*a*) that raises a serious issue with respect to the credibility of the person who is the subject of the appeal;

(*b*) that is central to the decision with respect to the refugee protection claim; and

protection des réfugiés, mais peut recevoir des éléments de preuve documentaire et des observations écrites du ministre et de la personne en cause ainsi que, s'agissant d'une affaire tenue devant un tribunal constitué de trois commissaires, des observations écrites du représentant ou mandataire du Haut-Commissariat des Nations Unies pour les réfugiés et de toute autre personne visée par les règles de la Commission.

Éléments de preuve admissibles

(4) Dans le cadre de l'appel, la personne en cause ne peut présenter que des éléments de preuve survenus depuis le rejet de sa demande ou qui n'étaient alors pas normalement accessibles ou, s'ils l'étaient, qu'elle n'aurait pas normalement présentés, dans les circonstances, au moment du rejet.

Audience

(6) La section peut tenir une audience si elle estime qu'il existe des éléments de preuve documentaire visés au paragraphe (3) qui, à la fois :

a) soulèvent une question importante en ce qui concerne la crédibilité de la personne en cause;

b) sont essentiels pour la prise de la décision relative à la demande d'asile;

(*c*) that, if accepted, would justify allowing or rejecting the refugee protection claim.	*c*) à supposer qu'ils soient admis, justifieraient que la demande d'asile soit accordée ou refusée, selon le cas.

VI. Parties' positions

[15] On the one hand, the applicant submits that the RAD erred in its assessment of the admissibility of the new evidence adduced by the applicant, contrary to subsection 110(4) of the IRPA. The applicant contends that the emails he received in July 2013 (Exhibits P-I and P-XV) show that the applicant was sought by the Russian police and confirm the connection between the applicant and the opposition. Further, according to the applicant, the official dismissal form submitted to the RAD (Exhibit P-XIV) shows that in Russia a grounds for dismissal must be provided, which the applicant's employer failed to do. In addition, the applicant claims that a hearing should have been held because the new evidence adduced, "…if accepted, would justify allowing or rejecting the refugee protection claim", pursuant to paragraph 110(6)(*c*) of the IRPA.

[16] Moreover, the applicant submits that the RAD erred in its assessment as to the reasonableness of the RPD's findings and of the merits of the six grounds of appeal brought before it. In this regard, the applicant argues that [TRANSLATION] "the RAD clearly erred in law when it merely indicated the standard to be applied to each of the grounds of appeal without any further study of the reasons for the initial rejection by the RPD, reasons that are unreasonable by their lack of explanation or justification" (Memorandum of the applicant at para 27).

[17] On the other hand, the respondent submits that the RAD must show deference to the findings of the RPD and that, on a standard of reasonableness, the RAD reasonably concurred with the exclusion of the new evidence adduced by the applicant and the decision not to hold a hearing, as well as with the merits of the RPD's findings with regard to the subjective and objective fear of the applicant.

VII. Standard of review

[18] To begin with, the Court's analysis regarding the RAD's interpretation of its own role as an appeal body, as well as the standard of review the RAD applied to the RPD's findings, must be reviewed on a standard of correctness (*Huruglica v Canada (Minister of Citizenship and Immigration)*, 2014 FC 799 [*Huruglica*]; *Yetna v Canada (Minister of Citizenship and Immigration)*, 2014 FC 858 at para 14 [*Yetna*]; *Iyamuremye v Canada (Minister of Citizenship and Immigration)*, 2014 FC 494 at para 20 [*Iyamuremye*]; *Alvarez v Canada (Minister of Citizenship and Immigration)*, 2014 FC 702 at para 17 [*Alvarez*]; *G.L.N.N. v Canada (Minister of Citizenship and Immigration)*, 2014 FC 859 at para 11 [*G.L.N.N.*]).

[19] This issue was addressed in a recent decision by Justice Yvan Roy (*Spasoja v Canada (Minister of Citizenship and Immigration)*, 2014 FC 913 at paras 7 and 8 [*Spasoja*]:

> [TRANSLATION]
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> [7] My colleague Justice Michael Phelan rendered a decision on August 22 on the same issues as those raised in this case (*Huruglica v Canada (Citizenship and Immigration)*, 2014 FC 799 (*Huruglica*)). In that decision, the RAD also found, based on *Newton*, above, that it had to impose a standard of review of

> reasonableness. Justice Phelan found that the issue of the applicable standard had to be assessed by this Court on the basis of correctness because it is a question of general interest to the legal system that goes beyond the scope of the administrative tribunal's expertise. As already stated, it is clear from *Dunsmuir*, above, that not many issues determined by an administrative tribunal are reviewed on a basis other than reasonableness, including questions of law. The type of issue identified by Justice Phelan is one of them.
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> [8] Issues of central importance to the legal system are one of the four categories identified by the case law of the Supreme Court as requiring the correctness standard of review, which is more favourable to judicial intervention. It seems to me that another category identified in *Dunsmuir* could apply in this case:
>
> > [61] Questions regarding the jurisdictional lines between two or more competing specialized tribunals have also been subject to review on a correctness basis: *Regina Police Assn. Inc. v. Regina (City) Board of Police Commissioners*, [2000] 1 S.C.R. 360, 2000 SCC 14; *Quebec (Commission des droits de la personne et des droits de la jeunesse) v. Quebec (Attorney General)*, [2004] 2 S.C.R. 185, 2004 SCC 39.
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> [Emphasis added.]

VIII. Analysis

[20] At the outset, the Court notes that the issue with regard to the role of the RAD as an appellate tribunal of RPD decisions has been the subject of recent decisions which, in this case, are determinative (*Spasoja*, above; *Yetna*, above; *G.L.N.N.*, above; *Huruglica*, above; *Alvarez*, above; *Eng v Canada (Minister of Citizenship and Immigration)*, 2014 FC 711; *Iyamuremye*, above).

[21] The application before this Court concerns the role of the RAD and the degree of deference it must exercise towards the RPD's findings. As shown earlier, given that is a question of general interest to the legal system which exceeds the scope of the RAD's area of expertise (*Huruglica*, above), the applicable standard, which is that of correctness, is favourable to judicial intervention.

[22] In *Alvarez*, below, the Court set out the RAD's role as an appeal tribunal, comparing it to that of the Immigration Appeal Division [IAD]:

> [25] The Court agrees that an appeal before the RAD is not an appeal *de novo*; the IRPA restricts the power of the RAD, in comparison to that of the IAD, to considering new evidence and to holding a hearing only in exceptional cases (see subsections 110(4) and 110(6) of the IRPA). However, the Court cannot accept that, as a result of these limitations, Parliament intended to confer on the RAD a similar jurisdiction as to that of a judicial review body. The Court does not feel that Parliament had such a restriction in mind. In this regard, the Court finds the reasoning in *Parizeau c Barreau du Québec*, 2011 QCCA 1498, [2011] RJQ 1506, presented by the applicants in support of their application, persuasive and instructive (the Supreme Court of Canada dismissed the application for leave to appeal from this judgment on March 15, 2012: 2012 CanLII 12782 (SCC)).
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> [Emphasis added.]

[23] In this case, the RAD, in its reasons, stated the following with regard to its role vis-à-vis the RPD:

> [44] In this case, it should be noted that the RAD is not a court of law and does not review RPD decisions, but rather hears appeals in an administrative and non-judicial context. The RPD and the RAD are both part of the Immigration and Refugee Board, but they are two distinct divisions.
>
> …

> [51] Relying on the reasoning of the Alberta Court of Appeal and the factors identified in its analysis in *Newton*, and making the necessary adjustments for the particular context of the RPD and the RAD, I am of the opinion that, except for strict questions of law or natural justice, it is appropriate for us, as members of the RAD, to extend the same deference to RPD decisions. In fact, this deference is the same as that which courts of law are required to extend to first-level decision-makers where the issue is a question of fact or a question of mixed law and fact. (Decision of the RPD)

[24] Later, in its reasons, the RAD proceeds with an analysis of the applicable standard for each of the six grounds of appeal raised by the applicant by asserting, for each ground, that "the applicable standard of review is reasonableness" (Decision of the RAD at paras 52-57). Following its analysis of the standard of review to be applied, the RAD, at paragraphs 58 and 59 of its reasons, states as follows:

> [58] In the following analysis of the merits of this appeal, I found it useful to group together all the points raised by the appellant and answer the following question: Did the RPD commit one or more unreasonable errors in its assessment of the evidence, including of the appellant's testimony?
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> [59] Reasonableness is based on the existence of justification, transparency and intelligibility within the decision-making process and whether the decision falls within a range of acceptable outcomes which are defensible in respect of the facts and law.
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> …
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> [63] My role in this appeal is not to reweigh the evidence or to conduct a microscopic examination of the RPD's decision, but rather to determine whether, when analyzed as a whole, the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law.

[25] The wording of subsection 111(1) of the IRPA indicates that if circumstances allow, the RAD must substitute its own decision for that of the RPD, confirming its appellate role and its

obligation to undertake an independent analysis of the evidence to form its own opinion (see *G.L.N.N.*, above, at para 15; *Huruglica*, above, at para 47). Indeed, the idea that the RAD may substitute an impugned decision by a determination that should have been rendered without first assessing the evidence is inconsistent with the purpose of the IRPA.

[26] The Court notes that upon reading the RAD's findings, the RAD validly acknowledged its appellate role as being distinct from that of a judicial court. However, with regard to the deferential standard exercised by the RAD vis-à-vis the RPD decision, the Court is of the view that in light of the jurisprudence and legislation, the RAD erred by according deference and by applying a reasonableness standard. In this regard, Justice George R. Locke, stated the following in *Yetna*, above:

> [16] Taking into consideration once more Justice Phelan's decision in *Huruglica*, above, I am of the view that the RAD erred in concluding that the RPD decision was reviewable on a reasonableness standard.
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> [17] Save for cases in which the credibility of a witness is critical or determinative, or where the RPD enjoys a particular advantage over the RAD in reaching a specific conclusion, the RAD owes no deference toward the RPD's assessment of the evidence: see *Huruglica*, at paras 37 and 55. The RAD has as much expertise as the RPD, and perhaps more in terms of analyzing relevant documents and parties' submissions.
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> [18] Pursuant to subsection 111(1) of the IRPA, the RAD is entitled to substitute a determination that, in its opinion, should have been made. Thus, the RAD must proceed with an independent review of the evidence in order to arrive at its own conclusion.

[27] In this perspective, Justice Roy's analysis is particularly instructive in that regard (*Spasoja*, above):

[TRANSLATION]

> [19] For now, two observations should be noted. First, the Act is clear that the RAD may only consider a new hearing in specific circumstances. Those circumstances do not include rehearing the evidence already before the RPD. If the RAD cannot dispose of the appeal, by confirming the RPD determination or by substituting the determination that should have been made, but the determination is erroneous, the matter may be referred back because a reassessment of the evidence is required. With respect, I cannot see how such a legislative scheme could easily accommodate a standard of review in which deference prevails.
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> [20] The second observation is that the legislative scheme, viewed as a whole, does not at all suggest deference within the meaning of the reasonableness standard. To the contrary, the Act instructs the RAD to examine the record of proceedings before the RPD while admitting additional evidence, in the prescribed circumstances. The English version of subsection 111(1) specifically states "[a]fter considering the appeal" before stating the possible outcomes for the RAD. There is no question of owing deference: the determination is confirmed or a new determination is substituted. If there was an error of fact or law, or mixed fact and law, but the RAD cannot confirm or substitute its determination without a new hearing to reassess the evidence before the RPD, the matter is referred back. I fail to see where deference, arising from the reasonableness standard, fits into that scheme considered as a whole.
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> [Emphasis added.]

[28] In addition, the Court adopts the following observations, which are determinative in this case:

[TRANSLATION]

> [11] In this case, while the RAD claimed to want to avoid duplicating the role of the RPD, it in fact transformed an appellate jurisdiction into judicial review, using the same case law from the Supreme Court and this Court in judicial review of immigration matters. The redundancy with the RPD that the RAD stated that it

> wanted to avoid was created with judicial review, which must be judicial, by definition, and not administrative. …
>
> [12] As for the ultimate result, I share the opinion of my colleague, Justice Phelan, *Huruglica*, above, that the RAD committed a reviewable error, according to any of the standards of review, when it reviewed an RPD decision "on the reasonableness standard rather than conducting an independent assessment of the Applicants' claim." That is also the finding arrived at by Justice Shore in *Alvarez v Canada (Citizenship and Immigration)*, 2014 FC 702 and *Eng v Canada (Citizenship and Immigration)*, 2014 FC 711, which were both rendered on July 17.
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> …
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> [15] The Act also clearly states the manner in which the RAD must fulfill its mandate. The appeal proceeds on the basis of the record of proceedings and new documentary evidence, in addition of course to receiving written submissions from the parties (subsection 110(3)). The new evidence that did not exist at the time of the hearing before the RPD, or that was not available at that time, is admissible on appeal (subsection 110(4)). In fact, the Act even expands the availability by rendering admissible the evidence that was available but that the person who is the subject of the appeal "could not reasonably have been expected in the circumstances to have presented, at the time of the rejection".
>
> [16] In a situation where documentary evidence is presented on appeal (subsection 110(3)), a hearing may be held if it raises a serious issue with respect to credibility (in addition to the fact that the documentary evidence is central to the decision and would justify allowing or rejecting the refugee protection claim: subsection 110(6)).
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> …
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> [24] … I share the opinion of Justice Phelan that "if the RAD simply reviews RPD decisions for reasonableness, then its appellate role is curtailed." (*Huruglica*, above, paragraph 39). I add that the legislative scheme gives no indication that the bar must be so high.

[29] The decision in *Alyafi v Canada (Minister of Citizenship and Immigration)*, 2014 FC 952 summarizes, by means of a comprehensive analysis, all of the Federal Court decisions made to

date with regard to the mandates of the RAD. Justice Luc Martineau's decision provides an overview to help arrive at a certain *stare decisis* in this regard.

[30] The Court concludes that the applicant was not provided with an adequate opportunity to be heard on the appropriate basis, namely, that which is set out in the IRPA, thereby justifying the intervention of the Court. This finding is not entirely dissimilar to the conclusion arrived at by this Court in *Iyamuremye*, above:

> [48] Although the RAD probably fulfilled its substantive duty according to the conclusion at which it arrived, the matter is referred back to the RAD solely because of the articulation of the reasons for its decision.

IX. Conclusion

[31] In light of the foregoing analysis, the Court finds that the application must be allowed.

JUDGMENT

THE COURT ORDERS AND ADJUDGES that

1. The application for judicial review be allowed;
2. There is one question to certify (see below).

Question for certification

The respondent submits the following question for certification. The Court accepts this question for certification for clarification by the Federal Court of Appeal:

> "What is the scope of the Refugee Appeal Division's review when considering an appeal of a decision of the Refugee Protection Division (RPD)?"

"Michel M.J. Shore"
Judge

Certified true translation
Sebastian Desbarats, Translator

FEDERAL COURT

SOLICITORS OF RECORD

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