Federal Court of Appeal  Cour d'appel fédérale

Date: 20160329

Docket: A-512-14

Citation: 2016 FCA 96

CORAM: **NADON J.A.**
GAUTHIER J.A.
DE MONTIGNY J.A.

BETWEEN:

MINISTER OF CITIZENSHIP AND IMMIGRATION

Appellant

and

PARMINDER SINGH

Respondent

and

CANADIAN ASSOCIATION OF REFUGEE LAWYERS

Intervener

Heard at Montréal, Quebec, on October 8, 2015.

Judgment delivered at Ottawa, Ontario, on March 29, 2016.

REASONS FOR JUDGMENT: DE MONTIGNY J.A.

CONCURRED IN BY: NADON J.A.
GAUTHIER J.A.

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REASONS FOR JUDGMENT

DE MONTIGNY J.A.

[1] The matter before the Court is an appeal from a judgment of Justice Jocelyne Gagné of the Federal Court (the judge), which allowed the application for judicial review of Parminder Singh (the respondent) of a decision of the Refugee Appeal Division (RAD) of the Immigration and Refugee Board of Canada regarding his claim for refugee protection. The respondent's refugee protection claim had previously been dismissed by the Refugee Protection Division (RPD), not only because he had failed to satisfactorily establish his identity, but because he was not credible and had an internal flight alternative available to him in India.

[2] The appeal raises for the first time the issue as to how to interpret subsection 110(4) of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 [IRPA], which governs admissible evidence before the RAD. This provision was enacted as part of the *Balanced Refugee Reform Act*, S.C. 2010, c. 8 [BRRA], the objective of which was to amend and implement unproclaimed provisions in the IRPA providing for the creation of the RAD.

[3] At the end of her reasons, the judge certified the following two questions:

1. What standard of review should be applied by this Court when reviewing the Refugee Appeal Division's interpretation of subsection 110(4) of the *Immigration and Refugee Protection Act*, SC 2001, c 27?

2. In considering the role of a Pre-Removal Risk Assessment officer and that of the Refugee Appeal Division of the Immigration and Refugee Board sitting in appeal of a decision of the Refugee Protection Division, does the test set out in *Raza v Canada (Citizenship and Immigration)*, 2007 FCA 385, for the interpretation of paragraph 113(*a)* of the *Immigration and Refugee Protection Act*, LC 2001, c 27, apply to its subsection 110(4)?

[4] The Minister of Citizenship and Immigration (the Minister) argued that the Federal Court erred in failing to apply the criteria laid out in *Raza v. Canada (Minister of Citizenship and Immigration)*, 2007 FCA 385, [2007] F.C.J. No 1632 [*Raza*] for the purposes of subsection 110(4), and that the RAD was entitled to refuse to admit into evidence a grade 12 diploma (the Diploma) that had been seized by the Canada Border Services Agency (CBSA) and that had not been submitted before the RPD. For the reasons that follow, I am of the view that the Minister's submissions must be accepted and that the appeal must therefore be allowed.

I. Background

[5] The respondent is a citizen of India. He alleges to have been friends with one Bhupinder Singh when he was pursuing his studies, but that he only saw him occasionally following his graduation in 2002. Nonetheless, this individual apparently showed up at the respondent's home in November 2012 to spend the night, before leaving for an unknown destination.

[6] Several days later, the respondent claims that the police arrested him in order to question him about Bhupinder Singh. He was purportedly held and tortured for three days before being released without conditions, when representatives from his village intervened on his behalf. Following this incident, he was apparently hospitalized for stomach pains. In support of his claims, he submitted a medical certificate to the RPD indicating that he had received treatment for injuries and vomiting, which contained a list of prescribed medications.

[7] About two weeks after this first incident, the respondent contends that the police arrested him a second time and detained him for 24 hours in order to question him further about

Bhupinder Singh, before he was released once again due to the intervention of representatives from his village.

[8] After this second incident, the respondent alleges that his mother hired a smuggler to get him out of India. The respondent arrived in Canada on January 29, 2013, and claimed refugee protection at the port of entry. He handed over to the CBSA the driver's licence and voter's card the smuggler had obtained for him, as well as two school certificates issued in 2000 and 2002. The documents were seized, and the CBSA concluded after an analysis that the driver's licence and voter's card were probably forgeries. The respondent was initially detained due to the difficulty in establishing his identity, and was later released on condition that he report weekly to the CBSA's offices.

[9] The hearing before the RPD was held on April 2, 2013, and the notice of that decision was issued on May 7, 2013. First, the RPD found that the respondent had failed to establish his identity. In this regard, it noted that the CBSA had determined that the driver's licence and voter's card were probably forgeries, and opined that his credibility had been undermined by the fact that he had not made any efforts to obtain genuine versions of these documents through his family in India.

[10] As for the school certificates, the RPD's record contained only the one that had been issued in 2000. Questioned about the 2002 Diploma, the respondent stated that he believed that it was still in the possession of Citizenship and Immigration Canada and that he did not understand why a copy of it had not been forwarded to the RPD. This explanation was rejected by the RPD,

and as a result there was no evidence to corroborate his claim of having studied with Bhupinder Singh until 2002.

[11] Lastly, the respondent had produced a copy of a ration card as well as a birth certificate. The ration card had been issued in 2008 but had been corrected in 2011 to remove the respondent's sister and replace the family photo, following his sister's marriage in 2010. The RPD found that the one-year gap between the marriage and the correction to the family's ration card affected the probative value of the document, since the photo attached to the ration card seemed to have been affixed permanently rather than in a manner that would permit it to be changed. Given that the four identity documents filed as evidence by the respondent raised concerns, the birth certificate alone was not sufficient to establish his identity.

[12] Second, the RPD continued its analysis to conclude that the respondent's narrative was not credible. The RPD pointed out that the respondent had changed the chronology of important events when he amended his Basis of Claim form, having initially placed his father's cardiac problems after the two arrests, and then between the two arrests. Given the significance of the events in question, the RPD did not accept the respondent's explanation that he had made a mistake with the dates and had only realized his error when he received his father's medical report. The RPD also noted that this medical report only indicated facial paralysis and bed rest for a five-day period, which does not correspond to the claim that his father was half paralysed and permanently bedridden. The RPD further concluded that the medical report relating to the respondent's stomach issues did not corroborate his allegations of torture.

[13] Even if the respondent had been able to establish his identity and the credibility of his narrative, the RPD ultimately found that he still had an internal flight alternative. While acknowledging that Indian police have the ability to pursue individuals throughout the country, the RPD nonetheless noted that only a limited group of militant Sikhs were targeted in this manner, and that the respondent did not have the profile of someone who would be targeted, were he to move elsewhere in India.

[14] On appeal at the RAD, the respondent submitted an application to file additional evidence, namely, a copy of the Diploma. In support of his application, he filed an affidavit attesting that he had received from his former counsel, on or about June 11, 2013, a copy of his file that included a copy of the Diploma, which had apparently been faxed to his former counsel by the CBSA on February 25, 2013. He pointed out that he had been unaware of this fact prior to June 11, 2013, that it was consequently impossible for him to have produced the document before the RPD, and that he was therefore justified in asserting during his hearing before the RPD that the Diploma had been seized.

[15] The RAD refused to allow the Diploma to be admitted into evidence. It first opined that subsection 110(4) of the IRPA should be interpreted in light of the jurisprudence that has developed around paragraph 113(a) of the same statute, and in particular on the basis of *Raza*, given the similar wording used in both provisions. The RAD also pointed out that the fact that evidence corroborates allegations or contradicts the findings of the RPD does not make it new evidence. Ultimately, the RAD found that the Diploma had been available to the respondent at the time of the hearing on April 2, 2013, since a copy of it had been sent to his former counsel on

February 25, 2013. Considering that the respondent had not alleged any incompetence or made a complaint against his former counsel, he and his counsel had access to the Diploma and it was reasonable to expect that the document would have been presented at the hearing before the RPD. Accordingly, the RAD concluded that the Diploma was inadmissible, and as a result, that there was no ground to hold a hearing.

[16] On the merits, the RAD was of the view that the three issues should be reviewed on a standard of reasonableness. With respect to the identity of the respondent, the RAD concluded that the RPD had erred by failing to make a finding on the probative value of the school certificates to establish the respondent's identity, analyzing them solely from the perspective of his credibility as to whether he had gone to school with Bhupinder Singh. Therefore, the RPD could not dismiss the birth certificate on the basis that this document alone was insufficient to establish the respondent's identity. The RAD therefore found that the respondent's identity had been duly established based on his school certificate and birth certificate. Second, the RAD was of the view that the RPD had not made an error of fact or of law in its overall assessment of the respondent's credibility, and that it could reasonably doubt his credibility in light of the varying information with regard to the chronology of events he claimed to have experienced, the fraudulent or altered documents he presented as evidence, and the medical documents that did not corroborate his allegations. Given these findings, the RAD was of the opinion that it was not necessary for it to respond to the internal flight alternative issue.

II. The Federal Court judgment

[17] Two issues were raised in the application for judicial review before the Federal Court. First the Court had to determine whether the RAD erred in applying the criteria in *Raza* to assess the admissibility of new evidence, and then consider the application of those criteria to the facts of the case. In both cases, the judge applied the reasonableness standard of review. The first issue concerned the interpretation of the RAD's home statute and was not subject to any of the exceptions to the presumption that this type of question is reviewable on the reasonableness standard, while the second was clearly a question of mixed fact and law.

[18] After comparing the wording of subsection 110(4) and paragraph 113(a) of the IRPA and acknowledging that the language was similar, the judge began by noting that the role of a Pre-Removal Risk Assessment (PRRA) officer differed from that of the the RAD. While PRRA officers are employees of the Minister and must show deference to decisions made by the RPD unless new evidence arises that would require a re-assessment of the risks set out in sections 96 and 97, the RAD is a quasi-judicial administrative tribunal that has been given the mandate of hearing appeals from decisions issued by the RPD and may set aside a decision in order to substitute the determination that, in its opinion, should have been made (IRPA, s. 111(1)). Given these distinctive roles, the judge was of the opinion that it was not appropriate to apply, *mutatis mutandis*, the criteria developed in the context of paragraph 113(a) to interpret subsection 110(4).

[19] Relying on a statement made in the House of Commons by the Minister of Citizenship and Immigration during a debate on the establishment of the RAD to the effect that refugee

claimants must be able to benefit from a "full fact-based appeal", the judge continued this line of reasoning by adding that adopting a restrictive approach to the admissibility of new evidence would prevent the RAD from fulfilling its mission. Lastly, she noted that the implicit factors identified by the Federal Court of Appeal in *Raza* "find their source in the purpose of paragraph 113*(a)*", according to Justice Sharlow herself. That being the case, the judge added, these factors are not transferable in the context of an appeal before the RAD.

[20] Having concluded that it was unreasonable for the RAD to have strictly applied the criteria established in *Raza* when it came time to interpret subsection 110(4) of the IRPA, the judge then inquired as to whether it was reasonable for the tribunal to have refused to admit the Diploma into evidence. She determined that this piece of evidence could be material to demonstrate that the RPD erred in making negative findings with respect to the respondent's credibility, namely, that the CBSA had not confiscated the Diploma and that the respondent had not established that he had attended school with Bhupinder Singh until 2002. The judge also found it unreasonable for the RAD to have concluded that the respondent should have brought this evidence before the RPD, given that it was not in his possession and that he mistakenly believed that the CBSA still had it. As for the fact that the respondent did not file a complaint against his former counsel, the judge opined that it was unreasonable to make this a prerequisite for filing new evidence or to expect the respondent to know the procedure for filing complaints before the Barreau du Québec.

III. Issues

[21] The Federal Court judge certified the following two questions:

1. What standard of review should be applied by this Court when reviewing the Refugee Appeal Division's interpretation of subsection 110(4) of the *Immigration and Refugee Protection Act*, SC 2001, c 27?

2. In considering the role of a Pre-Removal Risk Assessment officer and that of the Refugee Appeal Division of the Immigration and Refugee Board sitting in appeal of a decision of the Refugee Protection Division, does the test set out in *Raza v Canada (Citizenship and Immigration)*, 2007 FCA 385, for the interpretation of paragraph 113(*a)* of the *Immigration and Refugee Protection Act*, LC 2001, c 27, apply to its subsection 110(4)?

IV. Analysis

A. *Standard of review*

[22] It is well-settled that the role of this Court when hearing an appeal of a judgment on an application for judicial review is to determine first, whether the Federal Court identified the appropriate standard of review and second, whether it applied that standard correctly: *Agraira v. Canada (Public Safety and Emergency Preparedness)*, 2013 SCC 36 at paras. 45-47, [2013] 2 S.C.R. 559; *Wilson v. Atomic Energy of Canada Ltd.*, 2015 FCA 17 at para. 42, [2015] 4 R.C.F. 467 [*Wilson*] ; *Telfer v. Canada (Revenue Agency)*, 2009 FCA 23 at paras. 18-19, [2009] F.C.J No. 71. In other words, this Court should "step into the shoes" of the Federal Court and focus on the administrative decision that is the subject of the judicial review: *Merck Frosst Canada Ltd. v. Canada (Health)*, 2012 SCC 3 at para. 247, [2012] 1 S.C.R. 23.

[23] As noted earlier, the judge applied the reasonableness standard to the interpretation of subsection 110(4) of the IRPA. In so doing, she relied on the well-established presumption that one must normally defer to an administrative decision-maker when it is called upon to interpret a statute closely related to its function and with which it has particular familiarity: *Dunsmuir v. New Brunswick*, 2008 SCC 9 at para. 54, [2008] 1 S.C.R. 190 [*Dunsmuir*]; *Smith v. Alliance*

Pipeline Ltd., 2011 SCC 7 at paras. 26 and 28, [2011] 1 S.C.R. 160 [*Smith*]; *Canada (Canadian Human Rights Commission) v. Canada (Attorney General)*, 2011 SCC 53 at paras. 16 and 18, [2011] 3 S.C.R. 471; *Nor-Man Regional Health Authority Inc. v. Manitoba Association of Health Care Professionals*, 2011 SCC 59 at para. 36, [2011] 3 S.C.R. 616 [*Nor-Man*]; *Alberta (Information and Privacy Commissioner) v. Alberta Teachers' Association*, 2011 SCC 61 at para. 30, [2011] 3 S.C.R. 654; *Saskatchewan (Human Rights Commission) v. Whatcott*, 2013 SCC 11 at para. 167, [2013] 1 S.C.R. 467. Although this presumption is rebuttable, the judge correctly concluded that the interpretation of subsection 110(4) of the IRPA did not fall under one of the exceptions recognized by the existing jurisprudence: see, in particular *Dunsmuir*, at paras. 55 to 61; *Nor-Man*, at para. 35; *Smith*, at para. 26. Indeed, it is not a question of law of central importance to the legal system as a whole and outside the adjudicator's specialized area of expertise, or a constitutional question, a question regarding the jurisdictional lines between competing tribunals, or even a true question of jurisdiction.

[24] The intervener nonetheless asserted that the judge erred in selecting a reasonableness standard, on the ground that she had an obligation to put an end to the differences in interpretation resulting from the wording of subsection 110(4) within the RAD. Relying on this Court's recent decision in *Wilson*, the intervener related the various different approaches adopted by RAD members in applying subsection 110(4) and requested that we put an end to this uncertainty and to the conflicting results that are likely to result from it.

[25] With respect, I am not persuaded by this argument. It should be noted that *Wilson* is an "unusual" case, to use the expression employed by Justice Stratas, in that the question as to

whether the *Canada Labour Code*, R.S.C. 1985, c. L−2 permits dismissals on a without cause basis has been one of "persistent" discord, to the extent that the answer to this question has largely depended on the identity of the adjudicator. Furthermore, adjudicators are not bound by the decisions of their colleagues and operate independently rather than within an institution such as an administrative tribunal, which decidedly does not favour the emergence of a consensus or a consistent interpretation.

[26] In this instance, we are not confronted with a persistent discord that has existed for many years. The RAD was established in December 2012, and only began issuing decisions in 2013. There is therefore no urgent need to intervene, especially since the principles that will emerge from the jurisprudence of this Court and the Federal Court will necessarily provide a framework within which the RAD will be able to interpret subsection 110(4) of the IRPA. Thus, there is no need to depart from the general principle that an administrative tribunal is owed deference when it interprets its enabling statute; the early, tentative steps of the RAD and its differences of opinion as to the interpretation of certain statutory provisions do not affect the rule of law and are merely the inevitable consequence of choosing to entrust a specialized tribunal with the task of adjudicating disputes arising from the implementation of a new scheme.

[27] That said, there was reason to believe that this Court owed no deference with regard to the decision made by an administrative decision-maker in the context of the IRPA, where the certified question on the basis of which the Federal Court decision was being appealed raised an issue of statutory interpretation. After all, the Federal Court may only certify serious questions of general importance that transcend the interests of the parties: IRPA, s. 79. Is this not precisely

the type of question that requires a definitive interpretation and on which the Court of Appeal should rightly intervene to put a stop to inconsistencies that may develop within an administrative body? At least, this is what was suggested in decisions such as *Hilewitz v. Canada (Minister of Citizenship and Immigration); De Jong v. Canada (Minister of Citizenship and Immigration)*, 2005 SCC 57, [2005] 2 S.C.R. 706 and *Pushpanathan v. Canada (Minister of Citizenship and Immigration)*, [1998] 1 S.C.R. 982, 160 D.L.R. (4th) 193. In that last matter, Justice Bastarache (writing for the majority) states at paragraph 43:

> First, s. 83(1) would be incoherent if the standard of review were anything other than correctness. The key to the legislative intention as to the standard of review is the use of the words "a serious question of general importance" (emphasis added). The general importance of the question, that is, its applicability to numerous future cases, warrants the review by a court of justice. Would that review serve any purpose if the Court of Appeal were obliged to defer to incorrect decisions of the Board? Is it possible that the legislator would have provided for an exceptional appeal to the Court of Appeal on questions of "general importance", but then required that despite the "general importance" of the question, the court accept decisions of the Board that are wrong in law, even clearly wrong in law, but not patently unreasonable? The only way in which s. 83(1) can be given its explicitly articulated scope is if the Court of Appeal – and inferentially the Federal Court, Trial Division – is permitted to substitute its own opinion for that of the Board in respect of questions of general importance. This view accords with the observations of Iacobucci J. in *Southam*, *supra*, at para. 36, that a determination which has "the potential to apply widely to many cases" should be a factor in determining whether deference should be shown. While previous Federal Court decisions, including, arguably, the dispute in *Sivasamboo*, involve significant determinations of facts, or at the highest, questions of mixed fact and law, with little or no precedential value, this case involves a determination which could disqualify numerous future refugee applicants as a matter of law. Indeed, the decision of the Board in this case would significantly narrow its own role as an evaluator of fact in numerous cases.

[28] Yet the Supreme Court decided otherwise. In a recent decision, the highest court concluded that the presence of a certified question was not determinative and that the applicable standard of review for such questions is reasonableness: *Kanthasamy v. Canada (Citizenship and Immigration)*, 2015 SCC 61 at para. 44, [2015] S.C.J. No. 61. In order to reach such a

conclusion, the Court essentially relied on the fact that it is the judgment itself that is ultimately the subject of an appeal, and not merely the certified question.

[29] For all of these reasons, I therefore conclude that the judge correctly identified the standard of review to be applied to the application for judicial review that was before her. In other words, the RAD's interpretation of subsection 110(4) of the IRPA was subject to review on the reasonableness standard, in accordance with the presumption that an administrative body's interpretation of its home statute is owed deference by a reviewing court.

[30] I would hasten to add, as the judge did, that the present appeal does not turn on the role of the RAD and on the standard of review it should apply when ruling on decisions issued by the RPD, but solely on the factors the RAD must consider when assessing the admissibility of evidence that was not presented before the RPD. The standard to be applied by the RAD when reviewing a decision of the RPD on the merits is dealt with in another ruling of this Court in *Canada (Minister of Citizenship and Immigration) v. Huruglica*, 2016 FCA 93.

B. *Applicable criteria for the purposes of subsection 110(4) of the IRPA*

[31] As noted above, the original version of the IRPA had anticipated the creation of the RAD, tasked with hearing appeals of certain RPD decisions. However, the relevant provisions were never implemented, and it was ultimately not until the enactment of the *BRRA*, on June 29, 2010, that the unproclaimed provisions (after a few minor amendments) creating the RAD would be implemented. Those provisions came into force on December 15, 2012 (*Order Fixing*

December 15, 2012 as the Day on which Certain Sections of the Act Come into Force, S.I./2012-94, (2012) C. Gaz. II, 2980-2981; *IRPA*, s. 275).

[32] The version ultimately adopted by Parliament differs in certain respects from the original 2001 document. More specifically, subsection 110(3) allows the Minister and the person who is the subject of the appeal to present not only written submissions, as was the case in the original version, but documentary evidence as well. It was precisely in the wake of this amendment that subsection 110(4) was introduced, which restricts evidence that may be presented by the person who is the subject of the appeal to "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."

[33] The wording of this provision bears a striking resemblance to that in paragraph 113(a), which governs the admissibility of new evidence in PRRA applications. A comparison of both texts allows for a better visualization of this resemblance:

Evidence that may be presented	**Éléments de preuve admissibles**
110. (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.	110. (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.
Consideration of application	**Examen de la demande**
113. Consideration of an application for protection shall be as follows:	113. Il est disposé de la demande comme il suit :
(a) an applicant whose claim to refugee protection has been	a) le demandeur d'asile débouté ne peut présenter que des éléments de

rejected may present only new evidence that arose after the rejection or was not reasonably available, or that the applicant could not reasonably have been expected in the circumstances to have presented, at the time of the rejection;	preuve survenus depuis le rejet ou qui n'étaient alors pas normalement accessibles ou, s'ils l'étaient, qu'il n'était pas raisonnable, dans les circonstances, de s'attendre à ce qu'il les ait présentés au moment du rejet;

[34] There is no doubt that the explicit conditions set out in subsection 110(4) have to be met. Accordingly, only the following evidence is admissible:

- Evidence that arose after the rejection of the claim;
- Evidence that was not reasonably available; or
- Evidence that was reasonably available, but that the person could not reasonably have been expected in the circumstances to have presented, at the time of the rejection.

[35] These conditions appear to me to be inescapable and would leave no room for discretion on the part of the RAD. In the first place, the very wording of subsection 110(4) specifies that the person who is the subject of the appeal "may present only" (« ne peut présenter ») evidence that falls into one of these three categories, thereby excluding any other evidence. Second, one should not lose sight of the fact that this provision departs from the general principle according to which the RAD proceeds without a hearing, on the basis of the RPD's record (s. 110(3)) and must for that reason be narrowly interpreted. Indeed, the judge seems to agree with this approach, insofar as she states that the respondent "was required to establish that he could not have reasonably been expected to provide the newly submitted documents at his RPD hearing" (para. 47). If she ultimately sides with him, it is because his request to file this new evidence fell squarely, in her view, within the scope of subsection 110(4), "and it met its explicit criteria" (para. 62).

[36] The respondent and intervener relied on *Elezi v. Canada (Minister of Citizenship and Immigration)*, 2007 FC 240, [2008] 1 F.C.R. 365 [*Elezi*] and, to a lesser extent, on *Sanchez v. Canada (Minister of Citizenship and Immigration)*, 2009 FC 101, [2009] F.C.J No. 101, to argue that the RAD may take into account the probative value and credibility of evidence in order to counteract the requirements of subsection 110(4). With respect, I am unable to agree with this interpretation.

[37] I would first note that *Elezi* was issued nine months before the Court of Appeal's ruling in *Raza*, and is therefore no longer authoritative insofar as it departs from this later decision. In addition, in *Elezi*, the PRRA officer's decision not to admit some of the evidence was deemed to be unreasonable either because the evidence arose after the RPD's decision, or because the applicant could not reasonably have been expected to present that evidence to the RPD in the circumstances. As a result, the assertion that one cannot reject credible evidence on the sole ground that it is "technically inadmissible" must be considered purely as an *obiter*.

[38] The true crux of the issue here consists in determining whether the implied conditions of admissibility identified in the context of paragraph 113(*a*) by Justice Sharlow in *Raza* are also applicable to subsection 110(4). Because it goes to the heart of the submissions filed by counsel for both parties and the intervener, it is important to reproduce the following relevant excerpt from that decision:

> [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 made by the RPD (including a credibility finding)?

If not, the evidence need not be considered.

4. Materiality: If the evidence is material, in the sense that the refugee claim probably would have succeeded if the evidence had been made available to 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.

(b) 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).

[14] The first four questions, relating to credibility, relevance, newness and materiality, are necessarily implied from the purpose of paragraph 113(*a*), within

> the statutory scheme of the IRPA relating to refugee claims and pre removal risk assessments. The remaining questions are asked expressly by paragraph 113(*a*).
>
> [15] I do not suggest that the questions listed above must be asked in any particular order, or that in every case the PRRA officer must ask each question. What is important is that the PRRA officer must consider all evidence that is presented, unless it is excluded on one of the grounds stated in paragraph [13] above.

[39] As noted above, the judge refused to transpose the implicit admissibility criteria identified by the Court of Appeal regarding paragraph 113(*a*) to the context of subsection 110(4). Relying on the fact that questions relating to credibility, relevance, newness and materiality arise implicitly from the purpose of paragraph 113(*a*), as Justice Sharlow herself declared, the judge was of the opinion that the different role and status of the RAD as compared to that of a PRRA officer called for a distinctive analysis. For the reasons that follow, I cannot subscribe to this view.

[40] It must be assumed that Parliament's decision to use near-identical wording did not happen by chance. Under a well-known rule of interpretation, it must be presumed that Parliament, when it uses the same wording as a provision that has already been interpreted by the courts, intends to rely on that interpretation: see Elmer A. Driedger, *Construction of Statutes*, 2nd ed., Toronto, Butterworths, 1983 at p. 125.

[41] It is true that the French iteration of subsection 110(4) differs slightly from paragraph 113(*a*), insofar as it does not state "that the applicant could not reasonably have been expected…to have presented" (« *qu'il n'était pas raisonnable … de s'attendre à ce qu'il les ait présentés* »), but rather "that the person could not reasonably …have presented" (« *qu'elle n'aurait pas normalement présentés* »). I would agree with the judge that this distinction is not

particularly telling, nor is it sufficient, in and of itself, to set aside past jurisprudence that has developed with regard to paragraph 113(a). In addition, no great inference may be drawn from the absence of the word "new" in the English version of subsection 110(4). Not only is the word "new" (« nouveau ») nowhere to be found in the French version of paragraph 113(a), but it is furthermore self-evident that evidence that arose after the rejection of the refugee protection claim will necessarily be new.

[42] The fact that the RAD is a quasi-judicial administrative tribunal, as opposed to the PRRA officer, who is an employee of the Minister, acting within his or her employer's discretion, must obviously be taken into consideration. The same applies to the fact that the RAD has an appellate function and has the authority to set aside the RPD's decision and substitute that which should have been made, while the PRRA officer must show deference and does not sit in appeal of the RPD's decision and his or her only mission is to assess any new pre-removal risk. These distinctions are not determinative of the admissibility of new evidence, however, and I note that the trial judge did not specify how the distinctive role and status of the RAD and the PRRA officer should affect the criteria for admitting evidence or how it would allow for the negation of the presumption to which I referred above.

[43] In fact, the criteria used in *Raza* are consistent with the tests generally adopted by courts and administrative bodies, and are essentially designed to preserve the integrity of the judicial process: see *Public School Boards' Assn. of Alberta v. Alberta (Attorney General)*, 2000 SCC 2 at para 10, [2000] 1 S.C.R. 44. Although they were established by the Supreme Court in the context of a criminal proceeding (see *Palmer v. The Queen*, [1980] 1 S.C.R. 759 at p. 775, 106

D.L.R. (3d) 212 [*Palmer*]), the criteria of newness, relevance, credibility and materiality were subsequently applied in civil matters (*J.T.I MacDonald Corp. v. Canada (Attorney General)*, 2004 CanLII 30110 at para. 3, [2004] J.Q. no 9409 (C.A.Q.), in disciplinary law (*Morin v. Regional Administration Unit #3 (P.E.I.)*, 2002 PESCAD 9 at para. 140, 213 D.L.R. (4th) 17 (P.E.I.C.A.), in aboriginal law (*Chippewas of Nawash First Nation v. Canada (Minister of Fisheries and Oceans)*, 2002 FCA 22 at para. 20, [2002] F.C.J No. 146) and in a number of other areas (see Donald J.M. Brown, *Civil Appeals*, Carswell, Toronto, 2015, pp. 10-16 to 10-18).

[44] Indeed, in my view it would be difficult to argue that the criteria set out by Justice Sharlow in *Raza* do not flow just as implicitly from subsection 110(4) as from paragraph 113(a). It is difficult to see, in particular, how the RAD could admit documentary evidence that was not credible. Indeed, paragraph 171(a.3) expressly provides that the RAD "may receive and base a decision on evidence that is adduced in the proceedings and considered credible or trustworthy in the circumstances." It is true that paragraph 110(6)(a) also introduces the notion of credibility for the purposes of determining whether a hearing should be held. In that regard, however, it is not the credibility of the evidence itself that must be weighed, but whether otherwise credible evidence "raises a serious issue" with respect to the general credibility of the person who is the subject of the appeal. In other words, the fact that new evidence is intrinsically credible will not be sufficient to warrant holding a hearing before the RAD: this evidence would still be required to justify a reassessment of the overall credibility of the applicant and his or her narrative.

[45] The same would apply to relevance. This is a basic condition for the admissibility of any piece of evidence, and it would be difficult to imagine the introduction of new evidence being

somehow exempt from this criterion. Indeed, Rules 3(3)(g)(iii) and 5(2)(d)(ii) of the *Refugee Appeal Division Rules*, S.O.R./2012-257 implicitly allude to this by providing that both the appellant's memorandum and memorandum in reply must include full and detailed submissions regarding how any documentary evidence the appellant wishes to rely on not only meets the requirements of subsection 110(4), but also how that evidence relates to the appellant (« la façon dont ils sont liés à l'appelant »).

[46] The newness criterion may appear somewhat redundant and does not really add to the explicit requirements of subsection 110(4).

[47] As for the fourth implicit criterion identified by this Court in *Raza*, namely, the materiality of the evidence, there may be a need for some adaptations to be made. In the context of a PRRA, the requirement that new evidence be of such significance that it would have allowed the RPD to reach a different conclusion can be explained to the extent that the PRRA officer must show deference to a negative decision by the RPD and may only depart from that principle on the basis of different circumstances or a new risk. The RAD, on the other hand, has a much broader mandate and may intervene to correct any error of fact, of law, or of mixed fact and law. As a result, it may be that although the new evidence is not determinative in and of itself, it may have an impact on the RAD's overall assessment of the RPD's decision.

[48] Under subsection 110(6) of the IRPA, a RAD hearing may be held, subject to three conditions associated with the existence of new documentary evidence. The principle whereby the RAD proceeds without holding a hearing, as set out in subsection 110(3), is subject to an

exception only where the documentary evidence "(a) […] raises a serious issue with respect to the credibility of the person who is the subject of the appeal; (b) […] is central to the decision with respect to the refugee protection claim; and (c) […] if accepted, would justify allowing or rejecting the refugee protection claim." These three conditions are unquestionably related to the materiality of the new documentary evidence that the RAD could be required to consider. If such is the case, as one would have reason to believe, it would be redundant to require materiality of evidence for it to be admissible as new evidence, to then subject the conduct of a hearing to the same criterion.

[49] Subject to this necessary adaptation, it is my view that the implicit criteria identified in *Raza* are also applicable in the context of subsection 110(4). For the reasons set out above, I am not satisfied that the differing roles of the PRRA and the RAD, and the separate status of persons who perform these functions, are sufficient to set aside the presumption that Parliament intended to defer to the courts' interpretation of a legislative text when it chose to repeat the same essential points in another provision. Not only are the requirements set out in *Raza* self-evident and widely applied by the courts in a range of legal contexts, but there are very good reasons why Parliament would favour a restrictive approach to the admissibility of new evidence on appeal.

[50] As the Supreme Court noted in *Palmer*, a well-established judicial principle exists whereby the evidence and issues must be introduced exhaustively and dealt with at trial in criminal matters or at first instance in civil matters. As a case progresses, the issues in the matter must normally be further narrowed; the effect of introducing new evidence would be rather to

expand the scope of the debate. This is what the RAD aptly highlighted at paragraph 20 of its reasons:

> On this topic, it should be noted that the fact that evidence corroborates facts, contradicts RPD findings or clarifies evidence before the RPD does not make it "new evidence" within the meaning of subsection 110(4) of the Act. If that were the case, refugee protection claimants could split their evidence and present evidence before the RAD at the appeal stage that could have been presented at the start, before the RPD. In my opinion, this is exactly what subsection 110(4) of the Act seeks to prohibit.
>
> [Footnotes omitted]

[51] In this regard, it is significant to note that Parliament's departure from the principle of a paper-based appeal, held in the original version of the IRPA adopted in 2002, was limited. At the risk of repeating myself, the basic rule is that the RAD "must proceed without a hearing, on the basis of the record of the proceedings of the Refugee Protection Division […]" (s. 110(3)). The new evidence must meet the admissibility criteria set out in subsection 110(4), and a new hearing can be held only if the new evidence fulfils the conditions set out in subsection 110(6). Where the RAD finds that all of the evidence should be heard again in order to make an informed decision, it must refer the case back to the RPD (ss. 111(2)). This legislative framework reflects Parliament's clear wish to narrowly define the introduction of any new evidence.

[52] The judge acknowledged that an appeal filed with the RAD is "mostly intended as a 'paper-based' appeal" (para. 52). However, it is her opinion that a strict interpretation of subsection 110(4) would limit an applicant's access to a "full fact-based appeal," which would go against the wishes expressed by Jason Kenney, former Minister of Citizenship and Immigration, in a statement made in the House on March 6, 2012 (*House of Commons Debates*, 41st Parl., 1st Sess., No. 90 (March 6, 2012) at p. 5874).

[53] It is true that in tabling the bill, the Minister affirmed that the vast majority of applicants from non-designated countries would have, for the first time, a "fact-based appeal" before the RAD. This statement alone is insufficient to substantiate the theory that criteria explicitly set out at subsection 110(4) can be set aside. It is at best ambiguous, and could be simply construed as differentiating the appeal from the much narrower scope of a judicial review. In this regard, I support the argument of the appellant and his analysis of the circumstances in which the Minister made his statement.

[54] The judge also based the decision on the reduced timeframes within which claimants must submit their documents to support the flexible interpretation of the admissibility criteria she considered in her decision. The amendments made to the IRPA and to the *Immigration and Refugee Protection Regulations,* S.O.R./2002-227 [IRPR] do put a great deal of pressure on refugee protection claimants. The referral of a claim to the RPD is done within the three days following the filing of the claim (IRPA, subsection 100(1)), and the hearing must take place within 60 days of the referral (IRPR, paragraph 159.9(1)(b)), and even within 30 or 45 days for nationals from a designated country. Furthermore, according to paragraph 34(3) of the *Refugee Protection Division Rules*, S.O.R./2012-256 [RPD Rules], refugee protection claimants must file their supporting documentation before the RPD 10 days before the hearing. However, these considerations do not suffice to set aside the clear legislative intention to not authorize any new evidence on appeal other than in very specific and carefully defined circumstances. The role of the RAD is not to provide the opportunity to complete a deficient record submitted before the RPD, but to allow for errors of fact, errors in law or mixed errors of fact and law to be corrected.

[55] Inversely, the desire to counter the abuses that could occur under the regime applicable before the *BRRA* and the *Protecting Canada's Immigration System Act*, S.C. 2012, c. 17 came into force should not be invoked to restrict new evidence that those finding themselves with valid reason before the RAD should seek to file. In his factum, the Minister stated that the *BRRA* showed some degree of a willingness to enhance the admissibility criteria for new evidence at the RAD. Undoubtedly, Parliament intended to ensure the integrity of the immigration system by more effectively countering individuals who try to abuse it. To do so, Parliament took a certain number of measures, such as the creation of the RAD, and set out clear rules of evidence and procedure to ensure its appropriate functioning. These rules must be respected, and it must be presumed that the explicit choices that were made match the objective pursued. It is not the responsibility of the courts to rewrite such provisions when they are intelligible and unequivocal.

[56] Finally, the intervener stated that the RAD should take its inspiration from the values enshrined in the *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act, 1982* (UK), c. 11 [Charter] when it rules on the admissibility of new evidence. Based on paragraph 3(3)(d) of the *IRPA*, further to which the Act is to be construed and applied in a manner that ensures that decisions taken under this Act are consistent with the Charter, as well as the decisions rendered by the Supreme Court in *Doré v. Barreau du Québec*, 2012 SCC 12, [2012] 1 S.C.R. 395 [*Doré*] and *Loyola High School v. Quebec (Attorney General)*, 2015 SCC 12, [2015] 1 S.C.R. 613 [*Loyola*], counsel for the intervener claimed that the RAD had to go beyond the requirements set out in subsection 110(4) and was obligated to proceed with a proportionality analysis between the seriousness of the

violation of the Charter right and the statutory objectives. The following is how counsel described the test they propose (in paragraph 34 of their factum):

> (a) If the evidence is capable of credibly proving relevant circumstances that arose after the RPD's decision, then the evidence must be considered.
>
> (b) If the evidence is only capable of credibly proving relevant circumstances that arose prior to the RPD's decision, then the RAD should consider if the appellant established either (i) that the evidence was not reasonably available or (ii) that she could not reasonably have been expected in the circumstances to have presented it, at the time of the RPD decision. In this assessment, the RAD should recall that « in order for there to be a 'full fact-based appeal' before the RAD, the criteria for the admissibility of evidence must be sufficiently flexible to ensure it can occur » [*Singh v. Canada (MCI)*, 2014 FC 1022 at para. 55, *per* Gagné J.]. If the appellant is able to establish either condition, then the evidence must be admitted.
>
> (c) If the appellant is unable to satisfy either condition, then the RAD should consider whether the evidence raises a *prima facie* case of risk and, if admitted, could allow the RAD to come to a different conclusion on a central aspect of the claim than that of the RPD. If it does, then the RAD must conduct a proportionality exercise in which it balances the severity of the interference that exclusion would cause to the appellant's *Charter* rights with the statutory objectives underlying s. 110(4).

[57] With respect, I cannot agree with this argument. It is true that, in *Doré*, the Supreme Court stated that it was of the opinion that an administrative decision-maker must weigh the values set out in the Charter and the statutory objectives in the exercise of his or her discretionary power. In the context of a judicial review, the Court must determine whether the decision under review is the result of a proportionate balancing of the rights and values protected by the Charter, a process that bears some resemblance to the framework of analysis established in *R. v. Oakes*, [1986] 1 S.C.R. 103, 26 D.L.R. (4th) 200 when the very validity of a legislative text is challenged. This approach is well summarized in the following excerpt from *Doré*, at paragraph 57:

> On judicial review, the question becomes whether, in assessing the impact of the relevant Charter protection and given the nature of the decision and the statutory and factual contexts, the decision reflects proportionate balancing of the Charter

> protections at play. As LeBel J. noted in Multani, when a court is faced with reviewing an administrative decision that implicates Charter rights, "[t]he issue becomes one of proportionality" (para. 155) and calls for integrating the spirit of s. 1 into judicial review. Though this judicial review is conducted within the administrative framework, there is nonetheless conceptual harmony between a reasonableness review and the Oakes framework, since both contemplate giving a "margin of appreciation", or deference, to administrative and legislative bodies in balancing Charter values against broader objectives.

[58] Based on this approach, counsel for the intervener claim that the values protected by section 7 of the Charter must enter into the interpretation and application of subsection 110(4) of the IRPA and even lead to the admissibility of new evidence that does not meet the explicit requirements of this provision. However, this thesis encounters at least two difficulties.

[59] First of all, it has not been established in this case that the values protected by section 7 of the Charter are affected by the RAD's decision not to admit as new evidence the Diploma that the respondent wanted to adduce. The intervenor argued that excluding credible evidence could result in an appeal being dismissed and consequently in the removal of the foreign national "as soon as possible", because the conditional removal order comes into force 15 days after notification that the claim is rejected (IRPA, s. 49(2)c)). However, in my view this does not seem sufficient to conclude that the decision not to admit new evidence on appeal necessarily affects the right not to be deprived of life, liberty and security of the person except in accordance with the principles of fundamental justice.

[60] It is first noteworthy that the decision made by the RPD, and on appeal before the RAD, does not pertain to the respondent's removal, but solely to whether he is genuinely a Convention refugee or a person in need of protection in accordance with sections 96 and 97 of the IRPA. I

am prepared to recognize that the RAD's decision to exclude evidence on the grounds that it does not meet the criteria in subsection 110(4) will have a significant impact if a foreign national tries to submit that same evidence to a PRRA Officer or to a Removal Officer. Nevertheless, the respondent in this case failed to establish his credibility; the RAD found that the RPD could reasonably conclude that the respondent's credibility was seriously undermined, and that that conclusion would be valid even if the Diploma were admitted in evidence. For reasons set out below, I am of the opinion that that conclusion falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and the law, and consequently the respondent did not establish that his life, liberty or security would be in danger if he were returned to India.

[61] Second, the intervenor did not convince me that the RAD's decision not to admit new evidence would engage the principles of fundamental justice. It must be remembered that a foreign national claiming status as a refugee or a person in need of protection benefits from an extensive, multi-stage process that enables him to assert his claims before several levels of independent and impartial quasi-judicial tribunals and administrative decision-makers, and that he can apply for judicial review of those decisions to the Federal Court. While the right of appeal has not been recognized as a principle of fundamental justice (see *Medovarski* v. *Canada (Minister of Citizenship and Immigration)*, 2005 SCC 51 at para. 47, [2005] 2 S.C.R. 539; *Chiarelli v. Canada (Minister of Employment and Immigration)*, [1992] 1 S.C.R. 711 at pp. 741-742, 90 D.L.R. (4th) 289), Parliament decided to enhance the former regime and to implement the provisions of the IRPA establishing the RAD. The legislator could have provided only for an appeal on the record without a hearing, but elected to open the door to the submission of new

evidence and hearings in carefully limited circumstances. I fail to see how enhancing a system already broadly respectful of the international and constitutional obligations to which Parliament and the government are subject could jeopardize that same system, especially since the criteria used in respect of admissibility of new evidence are essentially similar to those normally used in judicial and quasi-judicial proceedings on appeal, in both civil and criminal matters. The constitutionality of subsection 110(4) of the IRPA has not been challenged in this case, so I will abstain from drawing any definitive conclusion in that regard. That said, I have not been convinced that the exclusion of the Diploma by the RAD is contrary to the principles of fundamental justice, even assuming that the exclusion of that evidence affects the respondent's right to life, liberty and security.

[62] However, there is more. A close reading of *Doré* shows that an administrative decision-maker's obligation to enforce Charter values arises only if it is exercising statutory discretion: *Doré*, para. 55; *Loyola*, para. 35; *R* v. *Clarke*, 2014 SCC 28 at para. 16, [2014] 1 S.C.R. 612. When legislation or regulations are clear and unambiguous, it is not up to the courts to rewrite them on the pretext of ensuring conformity with Charter values (*Najafi* v. *Canada (Minister of Public Safety and Emergency Preparedness)*, 2014 FCA 262 at para. 107, [2015] 4 F.C.R. 162; *Febles* v. *Canada (Citizenship and Immigration)*, 2014 SCC 68 at para. 67, [2014] 3 S.C.R. 431). Except under exceptional circumstances, the courts only have the authority to declare invalid legislation that is unconstitutional, and only if the issue is explicitly raised and the Attorney General has been notified. It is up to Parliament to amend legislation that has been declared unconstitutional so as to ensure compliance with the fundamental law of the land.

[63] However, subsection 110(4) is not written in an ambiguous manner and does not grant any discretion to the RAD. As mentioned above (see paras. 34, 35 and 38 above), the admissibility of fresh evidence before the RAD is subject to strict criteria and neither the wording of the subsection nor the broader framework of the section it falls under could give the impression that Parliament intended to grant the RAD the discretion to disregard the conditions carefully set out therein. Moreover, this approach complies perfectly with this Court's decision in *Raza*. The criteria set out in that decision regarding paragraph 113(a), which, moreover, are not necessarily cumulative, do not replace explicit legal conditions; rather they add to those conditions to the extent that they are "necessarily implied" from the purpose of the provision, to reiterate this Court's words at paragraph 14 of *Raza*. Otherwise, this would mean ignoring the conditions set out at subsection 110(4) and then delving into a balancing exercise between Charter values and the objectives sought by Parliament. In the absence of a direct challenge to this legislation, it should be given effect and the RAD has no choice but to comply with its requirements.

[64] In conclusion, I am of the view that there is no valid reason not to apply, for the most part, the implicit criteria established by this Court in *Raza* to subsection 110(4) of the IRPA. The wording of that provision is almost identical to the wording of paragraph 113(a), and the context in which it was adopted as well as the underlying judicial policy considerations support an identical approach despite the fact that they apply to separate proceedings and different decision-makers. In any case, the issue seems rather academic to me, to the extent that the implicit criteria from *Raza* do not truly add to the wording of subsection 110(4) but are necessarily implied. Except for the materiality of evidence, which does not lend itself to the same analysis in an

appeal and which subsection 110(6) already considers in determining whether a new hearing should be held, it is not necessary to interpret subsection 110(4) and paragraph 113(a) differently. It goes without saying that the RAD always has the freedom to apply the conditions of subsection 110(4) with more or less flexibility depending on the circumstances of the case.

[65] Thus, it is my opinion that the RAD did not err in using "*mutatis mutandis*" the implicit criteria from *Raza* to interpret subsection 110(4); this interpretation seems not only reasonable but also correct. Furthermore, the RAD could reasonably find that the Diploma was inadmissible because it could not be considered fresh evidence. The RAD essentially based its finding on the fact that the respondent had access to the Diploma at the time of his hearing before the RPD on April 2, 2013, since the CBSA had sent a copy of it to his counsel and he could have obtained a copy from the CBSA and submitted it himself as evidence to the RPD.

[66] It is true that the immigration officer apparently did not submit the Diploma to the RPD, as he should have under subsection 3(5) of the *RPD Rules*. Furthermore, the respondent contends that he only learned in June 2013 that his lawyer before the RPD had received a copy of that document in February 2013. However, that claim by itself is not enough to relieve the respondent of any responsibility. It is settled that an applicant must live with the consequences of the actions of his counsel: *Cove c. Canada (Minister of Citizenship and Immigration)*, 2001 FCT 266 at paras. 6-11, [2001] F.C.J No. 482. As the Federal Court noted in *Nagy v. Canada (Minister of Citizenship and Immigration)*, 2013 FC 640 at para. 60, [2013] F.C.J No. 664, "[t]here is a high threshold governing the circumstances and evidentiary criteria that must be met before the Court will grant relief under section 18.1 of the *Federal Courts Act* on the basis of the negligence of

counsel." See also: *Bedoya v. Canada (Minister of Citizenship and Immigration)*, 2007 FC 505 at para. 19, [2007] F.C.J No. 680.

[67] In this respect, I would note that it is settled in Federal Court immigration jurisprudence that an allegation of professional incompetence of counsel will not be upheld if there is no evidence that a complaint has been filed with the competent authorities of the bar to which the counsel belongs or without an explanation personally issued by the professional involved: see as examples, *Odafe v. Canada (Minister of Citizenship and Immigration)*, 2011 FC 1429 at para. 8, [2011] F.C.J No. 1762; *Teganya v. Canada (Minister of Citizenship and Immigration)*, 2011 FC 336 at paras. 26-37, [2011] F.C.J No. 430; *Parast v. Canada (Minister of Citizenship and Immigration)*, 2006 FC 660 at para. 11, [2006] F.C.J No. 844; *Yang v. Canada (Minister of Citizenship and Immigration)*, 2008 FC 269 at paras. 17-28, [2008] F.C.J No. 344. Indeed, the Federal Court adopted a protocol in March 2014 outlining the procedure when a party wishes to make such an allegation, and in particular setting out the obligation to send a notice to counsel who is the subject of the allegations that are to be made against him or her and invite him or her to provide a response that could be submitted to the Court (*Procedural Protocol Re: Allegations Against Counsel or Other Authorized Representative in Citizenship, Immigration and Protected Person Cases before the Federal Court* (March 7, 2014), on line: Federal Court of Canada <http://www.fct-cf.gc.ca>).

[68] In this case, the judge determined that it was unreasonable for the RAD to expect the applicant to know of the complaints procedure before the Barreau du Québec, much less be willing to attack the competence and ethics of his former counsel. I do not share that opinion.

Not only does the judge not cite any precedent to support her finding, but she also ignores the fact that the applicant was represented by experienced counsel before the RAD.

[69] In short, the RAD could reasonably conclude in the circumstances that the Diploma did not constitute new evidence. This piece of evidence is not new; it was accessible to the respondent, and his lawyer had received a copy from the CBSA. Since the respondent had not raised the issue of his lawyer's incompetence nor lodged any complaint against her with the appropriate authorities, the RAD had no choice but to reject this evidence in accordance with subsection 110(4) of the IRPA.

[70] Lastly, the judge invoked the possibility that inadmissibility of evidence could give rise to "serious issues of procedural equity" because a claimant who is deserving of a hearing could be refused one. In her opinion, such was the case here: "In the case at bar, the applicant was in fact denied a hearing because the 2002 school diploma was deemed inadmissible" (para. 53).

[71] However, as mentioned above, holding a hearing is not automatic simply because new evidence is admitted before the RAD. This new evidence must still meet the three criteria set out in subsection 110(6) of the IRPA. In this case, there was not even an attempt to show how the Diploma was determinative in establishing the respondent's credibility and how it would make up for the various shortcomings that the RPD identified in his testimony and that were confirmed by the RAD. It should be recalled that the RPD found that the respondent's narrative was deficient in several respects: he contradicted himself about precisely when his father had had a heart attack; neither his allegations of torture nor his father's purported medical condition are

corroborated by the medical evidence; he presented as evidence fraudulent and altered documents; and he took no steps to obtain probative, acceptable documents with which to establish his identity. In light of all these factors, it is far from a given that the Diploma would be essential in deciding the respondent's refugee protection claim and would warrant allowing this claim.

[72] Consequently, it cannot be assumed that admitting this document into evidence would have led to a hearing or that its rejection undermined procedural fairness. Nor can one invoke the possibility that a hearing might have resulted from the admission into evidence of the Diploma to argue for a flexible interpretation of subsection 110(4): not only does holding a hearing in the present case seem highly theoretical, but the admissibility of a piece of evidence cannot be assessed by taking account of the consequences that could result for the purposes of applying subsection 110(6).

V. Conclusion

[73] For all the above reasons, I am of the opinion that the appeal should be allowed, that the Federal Court judgment should be set aside and that the RAD decision should be confirmed. Accordingly, the respondent is not a Convention refugee or a person in need of protection within the meaning of sections 96 and 97 of the IRPA.

[74] I would answer the two certified questions submitted to this Court as follows:

1. What standard of review should be applied by this Court when reviewing the Refugee Appeal Division's interpretation of subsection 110(4) of the *Immigration and Refugee Protection Act*, SC 2001, c 27?

Answer: The RAD's interpretation of subsection 110(4) of the IRPA must be reviewed in light of the reasonableness standard, in accordance with the presumption that an administrative agency's interpretation of its home statute should be shown deference by the reviewing court.

2. In considering the role of a Pre-Removal Risk Assessment officer and that of the Refugee Appeal Division of the Immigration and Refugee Board, sitting in appeal of a decision of the Refugee Protection Division, does the test set out in *Raza v Canada (Minister of Citizenship and Immigration)*, 2007 FCA 385 for the interpretation of paragraph 113(*a*) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 apply to its subsection 110(4)?

   Answer: To determine the admissibility of evidence under subsection 110(4) of the IRPA, the RAD must always ensure compliance with the explicit requirements set out in this provision. It was also reasonable for the RAD to be guided, subject to the necessary adaptations, by the considerations made by this Court in *Raza*. However, the requirement concerning the materiality of the new evidence must be assessed in the context of subsection 110(6), for the sole purpose of determining whether the RAD may hold a hearing.

"Yves de Montigny"

J.A.

"I agree
M. Nadon J.A."

"I agree
Johanne Gauthier J.A."

Translation

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

APPEAL FROM A JUDGMENT THE FEDERAL COURT DATED October 28, 2014, DOCKET NUMBER IMM-6711-13 (2014 FC 1022).

DOCKET:	A-512-14
STYLE OF CAUSE:	MINISTER OF CITIZENSHIP AND IMMIGRATION v. PARMINDER SINGH and CANADIAN ASSOCIATION OF REFUGEE LAWYERS
PLACE OF HEARING:	MONTRÉAL, QUÉBEC
DATE OF HEARING:	OCTOBER 8, 2015
REASONS FOR JUDGMENT:	JUSTICE DE MONTIGNY
CONCURRED IN BY:	NADON J.A. GAUTHIER J.A.
DATED:	MARCH 29, 2016

APPEARANCES:

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