Federal Court  Cour fédérale

**Date: 20150617**

**Docket: IMM-7972-14**

**Citation: 2015 FC 763**

**[UNREVISED ENGLISH CERTIFIED TRANSLATION]**

**Ottawa, Ontario, June 17, 2015**

**PRESENT: The Honourable Mr. Justice Simon Noël**

**BETWEEN:**

**MORANGWA MALAMBU**

**Applicant**

**and**

**THE MINISTER OF CITIZENSHIP AND IMMGRATION**

**Respondent**

## JUDGMENT AND REASONS

## I. Introduction

[1] This is an application by Morangwa Malambu [the applicant] pursuant to subsection 72(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA] for judicial review of a decision of the Refugee Appeal Division [RAD] dated November 3, 2014, which upheld the

decision of the Refugee Protection Division [RPD] rejecting the applicant's claim for refugee protection.

## II. Alleged facts

[2] The applicant is a citizen of the Democratic Republic of the Congo [DRC].

[3] He claims to be Alonzo Mpaka and that he is persecuted in the DRC by reason of his political opinions and allegiances.

[4] He stated that he obtained a passport under the name of Morangwa Malambu in order to leave the DRC for France. In March 2000, upon arriving in France, he applied for asylum under the name of Morangwa Malambu. His application was denied. He remained in France from March 2000 until March 2013.

[5] The applicant alleges having returned to the DRC in March 2013 to visit his family. He reports having been arrested under the name of Alonzo Mpaka by police during a demonstration organized by the Union for Democracy and Social Progress [UDPS] and having been detained from March 10, 2013, until April 5, 2013.

[6] After his release, he stated that he hid out at his uncle's before returning to France. He alleges that he remained in France until his departure for the United States in September 2013. After a three-month stay in the United States, the applicant made his way to Canada using a passport under the name of "Tsemengu" to cross the Canada-U.S. border.

[7] The applicant filed a claim for refugee protection in Canada on January 20, 2014. The RPD a rejected his refugee protection claim on April 11, 2014.

[8] The applicant appealed the decision to the RAD, which upheld the RPD's decision. That is the impugned decision.

## III. Decision of the Refugee Protection Division

[9] The RPD rejected the applicant's claim for refugee protection because it was of the opinion that he had failed to establish his identity. It also found the applicant's allegation that he was arrested by the authorities in the DRC upon his return in March 2013 not to be credible. The RPD concluded that the applicant was not in danger in the DRC. As a result, the RPD determined that the applicant was not a refugee within the meaning of sections 96 and 97 of the IRPA.

## IV. Impugned Decision of the Refugee Appeal Division

[10] The RAD dismissed documents filed by the applicant that he claimed to be new evidence because they had been filed before the RPD.

[11] It also rejected the applicant's request for a hearing on the ground that the criteria set out at subsection 110(6) of the IRPA had not been met.

[12] The RAD then explained its role and functions. In particular, it noted that an appeal to the RAD is not a proceeding in the nature of a judicial review nor is it an opportunity for a new trial. It stated that it must proceed with its own assessment of the evidence in order to form its own opinion. After providing an overview of the case law of the Court, the RAD wrote that it "must examine the merits of the case to determine whether the decision is well-founded in light of the evidence presented before the RPD and that contained in the appeal record" (Applicant's Record [AR] page 14 at para 36).

[13] After reviewing the evidence in the record, the RAD affirmed that it shared the RPD's finding that the applicant had not established his identity on a preponderance of the evidence. The RAD did not, however, agree with the RPD's comments with respect to the excerpt of the birth certificate and nationality certificate; nevertheless, it did not find that the comments invalidated the RPD's conclusions. In the RAD's view, the RPD's comments about the identity documents being "of crude means" were erroneous, given that an expert analysis by the Canada Border Services Agency [CBSA] had indicated that the documents were genuine and unaltered. The RAD further noted the contradictions and inconsistencies between these documents and the information provided by the applicant.

[14] In addition, the RAD determined that no probative value could be assigned to the certificate of lost identity documents, issued in Kinshasa on June 12, 2012, because the CBSA's expert analysis revealed that the document had been altered and was inconclusive with respect to its genuineness. The RAD further added that the information provided by the applicant about the document was not credible.

[15] The RAD also examined a document entitled "family composition" and noted that it too contained contradictory information.

[16] For the foregoing reasons, the RAD concluded that the applicant had failed to establish that his true identity was Alonzo Mpanka.

[17] As for the applicant's allegations that he had travelled to the DRC in March 2013, the RAD found that the RPD was justified in asking whether there was any documentation to establish his trip to the DRC.

[18] For all of those reasons, the RAD upheld the RPD's decision, namely, that the applicant was not a refugee within the meaning of sections 96 and 97 of the IRPA. The appeal was therefore dismissed.

## V. Parties' submissions

[19] The applicant first submits that the RAD breached a principle of natural justice and procedural fairness when it refused his request for a hearing. He argues that the RAD misinterpreted subsections 110(3), 110(4) and 110(6) of the IRPA and that the negative findings made by the RAD were founded on factual elements that were not addressed or explained before the RPD. He further contends that the RAD erred when it claimed that deference was owed to findings made by the RPD regarding the applicant's credibility and that the appeal before the RAD was a "trial de *novo*".

[20] The respondent replies that the RAD's decision not to hold a hearing was reasonable given that the applicant did not meet the criteria required for holding one. Therefore, the RAD did not breach the principles of natural justice and had correctly interpreted subsections 110(3), 110(4) and 110(6) of the IRPA. The respondent further states that the RAD must conduct an independent and thorough review of the record submitted to the RPD. It also maintains that the RAD must show deference to credibility findings made by the RPD and that the process is not an appeal *de novo*, but an actual appeal.

[21] The applicant further submits that the RAD erred in finding that the applicant was not credible on the issue as to his true identity. He contends that the RAD did not properly assess the documentary evidence and that it dismissed his school report cards and nationality certificate without valid reason. He argues that the RAD was looking for evidence that was beyond a reasonable doubt. He also maintains that the RAD breached the principles of procedural fairness set out in *Baker v Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817 [*Baker*] because the RAD had purportedly failed to consider all of the evidence in the record as well as the substance of his refugee protection claim.

[22] The respondent replies that the RAD's decision is reasonable. The respondent submits that the RAD raised enough negative inferences from the evidence to uphold the RPD's decision. The respondent further argues that the applicant is wrong to cite *Baker*, because the RAD is free to make its own procedural choices and because the applicant's right to participate was respected both before the RPD and during his appeal to the RAD.

VI. Issues

[23] After having reviewed the parties' submissions and their respective records, I would frame the issues as follows:

1. Did the RAD err in refusing to hold a hearing for the applicant?

2. Did the RAD err in upholding the RPD's decision that the applicant had failed to establish his identity on a preponderance of the evidence?

VII. Standard of review

[24] Several judges of this Court have issued an opinion as to which standard of review is to be applied to decisions of the RAD (*Yin v Canada (Minister of Citizenship and Immigration)*, 2014 FC 1209 at para 32 [*Yin*]; *Nahal v Canada (Minister of Citizenship and Immigration)*, 2014 FC 1208 at para 24 [*Nahal*]; *Ngandu v Canada (Minister of Citizenship and Immigration)*, 2015 FC 423 at paras 8 to 10). The issue as to which standard the Court should apply to these decisions requires a pragmatic approach.

[25] In this case, the RAD's application of the statutory provisions to the facts in this case, namely, with regard to whether to hold a hearing, is a question of mixed fact and law and is reviewable on a standard of reasonableness (*Akuffo v Canada (Minister of Citizenship and Immigration)*, 2014 FC 1063 at paras 26 and 27, see also paras 15 to 25; *Bui v Canada (Minister of Citizenship and Immigration)*, 2014 FC 1145 at para 17). As to the issue of whether the RAD erred in upholding the RPD's decision that the applicant had failed to establish his identity, this

is a question of fact. As such, a reasonableness standard is to be applied (*Dunsmuir v New Brunswick*, 2008 SCC 9, [2008] 1 SCR 190 at para 53 [*Dunsmuir*]). With regard to these two issues, this Court will only intervene if the decision is unreasonable, namely, if it does not fall within "a range of possible, acceptable outcomes which are defensible in respect of the facts and law" (*Dunsmuir*, above, at para 47).

## VIII. Analysis

### A. *Relevant statutory framework*

| *Immigration and Refugee Protection Act*, SC 2001, c 27 | *Loi sur l'immigration et la protection des réfugiés*, LC 2001, ch 27 |
|---|---|
| *Appeal to Refugee Appeal Division* | *Appel devant la Section d'appel des réfugiés* |
| Appeal | Appel |
| 110. | 110. |
| 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 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 | (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 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 |

Commissioner for Refugees and any other person described in the rules of the Board.

Unies pour les réfugiés et de toute autre personne visée par les règles de la Commission.

…

…

Evidence that may be presented

Éléments de preuve admissibles

(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.

(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.

…

…

Hearing

Audience

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

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

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

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

*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.

Décision

Decision

**111.** (1) La Section d'appel des réfugiés confirme la décision attaquée, casse la décision et y substitue la décision qui aurait dû être rendue ou renvoie, conformément à ses instructions, l'affaire à la Section de la protection des réfugiés.

**111.** (1) After considering the appeal, the Refugee Appeal Division shall make one of the following decisions:

(*a*) confirm the determination of the Refugee Protection Division;

(*b*) set aside the determination and substitute a determination that, in its opinion, should have been made; or

(*c*) refer the matter to the Refugee Protection Division for re-determination, giving the directions to the Refugee Protection Division that it considers appropriate.

(1.1) [Abrogé, 2012, ch 17, art. 37]

(1.1) [Repealed, 2012, c 17, s 37]

Renvoi

(2) Elle ne peut procéder au renvoi que si elle estime, à la fois :

Referrals

(2) The Refugee Appeal Division may make the referral described in paragraph (1)(*c*) only if it is of the opinion that

*a*) que la décision attaquée de la Section de la protection des réfugiés est erronée en droit, en fait ou en droit et en fait;

(*a*) the decision of the Refugee Protection Division is wrong in law, in fact or in mixed law and fact; and

*b*) qu'elle ne peut confirmer la décision attaquée ou casser la décision et y substituer la décision qui aurait dû être rendue sans tenir une nouvelle audience en vue du réexamen

(*b*) it cannot make a decision under paragraph 111(1)(*a*) or (*b*) without hearing evidence that was presented to the Refugee Protection Division.

> des éléments de preuve qui ont été présentés à la Section de la protection des réfugiés.

B. *Did the RAD err in refusing to hold a hearing for the applicant?*

[26] The issue as to whether to hold a hearing relates to subsections 110(3), 110(4) and 110(6) of the IRPA and paragraph 3(3)(*g*) of the *Refugee Appeal Division Rules* SOR/2012-257 [the Rules]. Subsection 110(3) states that "[s]ubject to subsections (3.1), (4) and (6), the Refugee Appeal Division must proceed without a hearing, on the basis of the record of the proceedings of the Refugee Protection Division…" Subsection 110(6) stipulates that the RAD "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) is central to the decision with respect to the refugee protection claim; (c) that, if accepted, would justify allowing or rejecting the refugee protection claim". Subsection 110(3) refers to subsection 110(4), which explains that in an appeal to the RAD the applicant "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". Subparagraph 3(3)(*g*)(v) the Rules states that the "appellant's record must contain … a memorandum that includes full and detailed submissions regarding … why the Division should hold a hearing under subsection 110(6) of the Act if the appellant is requesting that a hearing be held".

[27] It is also up to the RAD, based on its assessment of the appellant's record, pursuant to subsection 111(1) of the IRPA, to confirm the impugned decision, to set aside the decision and

substitute a decision that, in its opinion, should have been made, or to refer the matter to the RPD for re-determination, giving the directions to the RPD that it considers appropriate. Subsection 111(2) of the IRPA specifically sets out that the RAD may refer the matter to the RPD for re-determination only if it of the opinion that:

> (a) the decision of the Refugee Protection Division is wrong in law, in fact or in mixed law and fact; and
>
> (b) it cannot make a decision under paragraph (*a*) or (*b*) without hearing evidence that was presented to the Refugee Protection Division. (Emphasis added.)

[28] Thus, a combined reading of sections 110 and 111 of the IRPA and of Rule 3 of the Rules indicates that where no new evidence is submitted to the RAD, but the RAD is of the opinion that the RPD's decision is wrong in law or fact or mixed law and fact, and that it can neither confirm nor set aside the decision appealed without itself holding a hearing to re-examine the evidence adduced, it must refer the matter back to the RPD.

[29] The RAD proceeds on the basis of the record before the RPD, but may use its discretion and hold a hearing if the applicant so requests, if new evidence is presented by the applicant and accepted by the RAD and it is satisfied that this evidence meets the criteria set out in subsection 110(6) of the IRPA. Thus the RAD may only decide to hold a hearing where an appellant raises new documentary evidence that is the subject of subsection 110(4) of the IRPA. This analysis of the statutory provisions regarding the RAD is consistent with the recent case law of this Court, as will be demonstrated further on.

[30] In his written memorandum, the applicant submits that the RAD erred in refusing to grant him a hearing, thus violating a principle of natural justice and procedural fairness. He argues that subsection 110(6) covers both new evidence and evidence that is already in the record. At the hearing, in response to the Court's question as to what statutory interpretation is to be applied to subsection 110 of the IRPA, counsel for the applicant replied that it was clear that new evidence was required in order to be given a hearing before the RAD. He confirmed this position in his supplementary submissions presented after the hearing. He added, however, that where a serious issue of credibility arises, even if no new evidence is adduced, the RAD may use its discretion and decide to hold a hearing anyway, which is what should have happened in this case. Counsel for the applicant states his position on the *audi alteram partem* rule, and refers to the Supreme Court of Canada's decision in *Singh v Canada (Minister of Employment and Immigration)*, [1985] 1 SCR 177 [*Singh* SCC] to assert that fundamental justice requires that a hearing be held where a serious issue of credibility is involved.

[31] In response to the applicant's arguments, counsel for the respondent cites *Canada (Attorney General) v Mavi*, 2011 CSC 30, at paragraph 39, which stipulates that:

> **[39]** Accordingly, while the content of procedural fairness varies with circumstances and the legislative and administrative context, it is certainly not to be presumed that Parliament intended that administrative officials be free to deal unfairly with people subject to their decisions. On the contrary, the general rule is that a duty of fairness applies. See G. Régimbald, *Canadian Administrative Law* (2008), at pp. 226-27, but the general rule will yield to clear statutory language or necessary implication to the contrary: *Ocean Port Hotel Ltd. v. British Columbia (General Manager, Liquor Control and Licensing Branch)*, 2001 SCC 52, [2001] 2 S.C.R. 781, at para. 22. There is no such exclusionary language in the *IRPA* and its predecessor legislation.

According to the respondent's counsel, based on this passage, tribunals have a duty of fairness, while complying with the statutory framework in question. She is of the opinion that based on section 110 of the IRPA, the RAD must have new evidence presented to it in order to be able to use its discretion to grant a hearing to an appellant. I agree.

[32] In this case, the RAD presented its analysis of the IRPA with respect to the appeal process and submissions of new evidence to it (AR, RAD Decision, Tab 3, pages 10-11 at paras 15 to 22). It dismissed the two documents presented as new evidence by the applicant, namely, an attestation of family composition, issued on January 27, 2014, in Lemba, as well as a nationality certificate, issued on November 18, 2013, in Kinshasa, because both pieces of evidence had been submitted to the RPD. Indeed, these two documents had been entered into the appeal record at the RAD as new evidence (Certified Tribunal Record [CTR] at pages 57 and 58) when they had already been submitted before the RPD (CTR at pages 159 and 202). The RAD therefore reasonably found that the documents did not meet the criteria in subsection 110(4) of the IRPA to be considered admissible as new evidence. As a result, from a review of subsections110(3), 110(6) and 110(4) of the IRPA referred to above, given that the applicant had failed to provide new evidence, the RAD correctly determined that no hearing was required. The statutory framework put in place by section 110 clearly sets out the circumstances in which a hearing may be held and the applicant presented no case law to the contrary. The case law of this Court is consistent with respect to the issue of holding a hearing before the RAD.

[33] Indeed, Justice Shore, in *Sajad v Canada (Minister of Citizenship and Immigration)*, 2014 FC 1107, stated the following:

> **17** First, a hearing can only be held before the RAD when an appellant raises new documentary evidence that is the subject of subsection 110(4) of the IRPA. The applicant did not submit any new evidence before the RAD that could justify holding a hearing under subsection 110(6) of the IRPA. The RAD appropriately based its analysis on the record that was before the RPD.

[34] The undersigned echoed this analysis in *Yin*, above, at paragraph 30. In *Bui*, above, at paragraphs 18 to 21, Justice Shore wrote, once again, regarding an applicant's request for a hearing being refused by the RAD**:**

> **18** First, paragraph 3(3))(*g*) of the *Refugee Appeal Division Rules*, SOR/2012-257 [Rules], below, states that the appeal record before the RAD must include full and detailed submissions regarding the relevance of the new evidence relied upon in the appeal and whether it meets the requirements of subsection 110(4) of the IRPA.
>
> **19** Second, the RAD generally reviews appeals without holding a hearing. However, the RAD may hold a hearing in limited circumstances, in accordance with subsections 110(3) and 110(6) of the IRPA. Furthermore, the onus is on the applicant to justify the holding of a heating and to provide full and detailed submissions to the RAD, as required under paragraph 3(3)(*g*) of the Rules.
>
> …
>
> **20** However, in its reasons, the RAD rejected the new evidence filed by the applicant on the basis that the applicant failed to meet the criteria required under the IRPA and Rules. In addition, the RAD indicated that the evidence filed on appeal was dated November 7 and 25, 2013, and was therefore available before the RPD issued its decision on December 4, 2013. Furthermore, the RAD noted that the lack of relevance of this new evidence added to its inadmissibility. Moreover, the RAD stated that the applicant had failed to show how the holding of a hearing would be justified under subsections 110(3) and 110(6) of the IRPA.
>
> **21** In light of its analysis of the evidence and statutory framework, it was reasonable for the RAD to find the evidence filed by the applicant on appeal inadmissible, on the basis that this

> evidence failed to meet the requirements set out in the IRPA and Rules. It was also open to, and reasonable for, the RAD to conclude that the circumstances did not warrant the holding of a hearing.

[35] In *Djossou v Canada (Minister of Citizenship and Immigration)*, 2014 FC 1080, at paragraph 41, Justice Martineau explained:

> **41** It is clear from reading the aforementioned provisions that the RAD can set aside the RPD's decision and substitute the decision that, in its opinion, should have been made, which means that the RAD has much broader powers on appeal that those of a traditional Court of law sitting in judicial review. Not only that, the RAD may, among other things, admit new evidence and decide to hold an oral hearing in specific circumstances set out by Parliament (subsections 110(3) to (6) of the IRPA). Further, the RAD exercises exclusive jurisdiction on appeal that is at least equal to that of the RPD at first instance (subsection 162(1) of the IRPA) and can itself render the decision that ought to have been rendered by the RPD (section 111 of the IRPA). Such is not the case with the Federal Court, whose jurisdiction is limited by sections 72 to 75 of the IRPA, as well as by sections 18 and 18.1 of the *Federal Courts Act*. In addition, the remedies available to the Federal Court are limited in principle to setting aside the decision and remitting the matter for redetermination, which is not the case with the RAD vis-à-vis the RPD. (Emphasis added.)

[36] Therefore, given that it is necessary to submit new evidence, which must be admitted by the RAD, in order for it to determine whether a hearing is warranted, as defined in the statutory framework of section 110 of the IRPA, and that there is no new evidence in this case, the RAD reasonably concluded that there was no need to hold a hearing as was sought by the applicant. It therefore correctly proceeded on the basis of the record before the RPD.

[37] The applicant's arguments that the RAD ought to have held a hearing because natural justice requires that a hearing be held where a serious issue of credibility arises, according to *Singh* SCC, above, and that the RAD had violated the principles set out in *Baker*, above, cannot be accepted in this case. Although *Baker*, above, which the applicant refers to, dealt with a permanent residence application from outside Canada on humanitarian and compassionate grounds [H&C application], the principles established therein are applicable to this case. While the objectives and procedural framework surrounding H&C applications are completely different from those in an appeal before the RAD, I am of the opinion that the statement issued by the Supreme Court, namely, that a hearing is not always necessary to ensure a fair hearing and consideration of the issues involved (at paras 33 and 34) is applicable in the matter under review. Therefore, where the RAD is concerned, the right to a hearing before it is not absolute and this right may be activated by the presentation of new written documentation, at the discretion of the RAD, as set out in section 110.

[38] In this case, the applicant had an opportunity to be heard and present his arguments before the RPD. The applicant did not submit new evidence to the RAD that would entitle him to request a hearing. The decision of the RAD not to hold a hearing in application of subsections 110(3), 110(4) and 110(6) and to proceed on the basis of the record that was before the RPD was therefore, once again, reasonable (*Baker*, at paras 33-34); a similar approach was adopted in the context of a request to reopen a hearing into the application to vacate refugee status *Seyoboka v Canada (Minister of Citizenship and Immigration)*, 2012 FC 1143 at paras 28-30 and in the context of a pre-removal risk assessment application in *Lupsa v Canada (Minister of Citizenship*

*and Immigration)*, 2007 FC 311 at paras 30-36. The applicant's rights to participate were therefore respected and there is no need for this Court to intervene.

[39] The applicant further argues that the proceeding before the RAD was a "*de novo* proceeding" while the respondent contends that it was a true appeal. As Justice Martineau discussed in *Djossou*, above, the issue as to whether an appeal to the RAD constitutes a "true appeal", an "appeal *de novo*", or another type of administrative appeal has yet to be determined by the Federal Court of Appeal. On this matter, I subscribe to the views of Justice Martineau who wrote, *inter alia*, that:

> [46] There is general agreement that there are usually three types of appeal: true appeal ("*appel veritable*"); appeal *de novo*; and hybrid appeal. Frank Falzon provides the following overview:
>
> > 3. There are three general types of appeals to specialized administrative tribunals. The most narrow is what *Dupras* [*v Mason*, 1994 CanLII 2772 (BC CA)] refers to as a true appeal, where the appeal is founded on the record and where the appellant must demonstrate a reviewable error of law, fact or procedure. The broadest is what *Dupras* describes as an appeal *de novo*, where the original decision is ignored in all respects, except possibly for purposes of cross-examination. The third is a mixed model of appeal in which the appellant retains the onus of demonstrating error and the appeal board receives the record, but the appeal is not limited as to grounds, the appeal board reviews the decision below for correctness and fresh evidence may be adduced without constraint. These three broad models are conceptual starting points, and are subject to variation according to the specific intent of the governing legislation. *Appeals to Administrative Tribunals* (2005) 18 Can J Admin L & Prac 1 at pp. 34-35.
>
> [47] The lax use of the terms "appeal *de novo*", "appeal", or "full appeal" can only add to the confusion that seems to exist

> among parties and attorneys. In this regard, from a legal perspective, what distinguishes an appeal *de novo* from a true appeal is that in an appeal *de novo*, the matter is heard as if it was at first instance: the second decision maker is not required to identify an error of fact or of law made by the initial decision maker (*Dupras v Mason*, 1994 CanLII 2772 (BC CA)). In short, the decision under appeal is owed no deference. In that sense, an appeal before the RAD therefore resembles, at first glance, a true appeal, but it may also be a hybrid appeal. Indeed, if certain colleagues of mine express the view that an appeal before the RAD is perhaps not an appeal *de novo* in the strict sense of the term, they do not exclude the possibility of reweighing the evidence that was before the RAD (*Iyamuremye*, above at para 35; *Eng*, above at para 26; *Alvarez*, above at para 25; *Huruglica*, above at paras 52 and 54).
>
> [48] It should be noted that a statutory text may specify that an appeal is heard *de novo*, but this is not always the case. Regard must be had in particular to the legislative context of the nature of the bodies in question and the impact of the decisions on individuals' rights. For example, section 63 of the IRPA (former sections 79 and 77 of the *Immigration Act*, RSC 1985, c I-2, since repealed) does not expressly provide that the IAD may hear an appeal *de novo*. Nonetheless, according to the case law, appeals from an immigration officer's refusal to issue a permanent resident visa to a sponsored member of the family class are heard *de novo* by the IAD (*Mohamed v Canada (Minister of Employment and Immigration)*, [1986] 3 FCR 90 at paras 9-13; *Kahlon v Canada (Minister of Employment and Immigration)*, 14 ACWS (3d) 81, [1989] FCJ No 104 (CAF) at para 5; *Kwan v Canada (Minister of Citizenship and Immigration)*, 2001 FCT 971, [2001] FCJ No 1333 at paras 15-18 [*Kwan*]).
>
> …

[40] What is clear in this case is that the RAD justifiably refused the request for a hearing. In such cases, it is clear that a *de novo* trial is not to be envisaged. For our purposes, the issue as to which sort of appeal is before the RAD is not determinative in this case. It is not necessary to make any pronouncements on the subject to dispose of this matter.

C. *Did the RAD err in upholding the RPD's decision that the applicant had failed to establish his identity on a preponderance of the evidence?*

[41] According to Rule 11of the *Refugee Protection Division Rules*, SOR/2012-256, a refugee claimant must establish their identity before the RPD. A heavy burden is on claimants to produce acceptable documentation establishing his or her identity (*Su v Canada (Minister of Citizenship and Immigration)*, 2012 FC 743 at para 4). If a claimant fails to establish his identity, the RPD may draw a negative conclusion as to the credibility of his narrative (*Matingou-Testie v Canada (Minister of Citizenship and Immigration)*, 2012 FC 389 at para 2 [*Matingou*]).

[42] The applicant first argues that the RAD must show no deference to the RPD's findings regarding his credibility. On the contrary, as is demonstrated by the case law of this Court, when a claimant's credibility is at issue, the RAD may accord a certain level of deference to the credibility findings of the RPD (*Bui*, above at para 25, citing *Yetna v Canada (Minister of Citizenship and Immigration)*, 2014 FC 858 at para 17; *Yin*, above at para 36; *Sajad*, above at paras 20 to 22 and 26).

[43] In this case, the RAD conducted its own assessment of the evidence. Although it came to the same conclusion as the RPD, it did not share the RPD's comments with regard to the excerpt of the applicant's birth certificate or nationality certificate (AR, page 15 at para 42). While the RPD had asserted that the documents could have been fashioned by anybody (CTR, RPD Decision, page 33 at para 9 and page 36 at para 23), the RAD pointed out that the CBSA's expert analysis showed the documents to be genuine and unaltered (AR, RAD Decision page 16 at paras 45, 48, 49). The RAD assessed those documents, in addition to the certificate of lost identity

document of the applicant and a document entitled "family composition". It properly identified inconsistencies between the information contained in the documents and the information provided by the applicant, at times also turning to the documentary evidence before coming to its own conclusion (AR, RAD Decision page 17 at para 50).

[44] The RAD also conducted a more thorough analysis than that carried out by the RPD (AR, RAD Decision page 17 at para 52). It raised other inconsistencies that had not been addressed by the RPD. Among other things, the RAD noted that the applicant claimed to have been born in Kinshasa, when the birth certificates of his children indicate that he was born in Goma (AR, RAD Decision page 18 at para 53; see children's' birth certificates at pages 290-291 of the CTR and applicant's refugee claim form at page 136 of the CTR).

[45] The applicant further submits that the RAD rejected his school report cards without reason. There is indeed no mention of school report cards in the RAD's analysis, though they are mentioned in the RPD decision. That said, these report cards were included in the appeal record before the RAD (CTR at pages 98-99). The RAD is not obliged to refer to every document in the record; the RAD's reasons in this case are sufficient in and of themselves to show that the applicant's record was given an in-depth examination by it. (*Newfoundland and Labrador Nurses' Union v Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62 at para 16). Moreover, report cards on their own cannot be used to establish the applicant's identity. Therefore, the fact that they are not mentioned in the RAD's analysis does not render the decision unreasonable.

[46] The applicant's argument the RAD applied a burden of proof beyond all reasonable doubt must also fail. The RAD conducted a thorough and complete analysis of the evidence and reasonably decided to uphold the RPD's decision that the applicant had failed to establish his identity on a preponderance of the evidence (AR page 15 at para 42). Nothing in the RAD's decision suggests that it imposed a higher burden than necessary on the applicant. Furthermore, the decision upon which the applicant relies to support his argument is not in his favour. In effect, the passage from *Canada (Minister of Citizenship and Immigration) v Singh*, 2004 FC 1634 [*Singh*] on which he relies states:

> [38] When we refer to the applicable section of the law, it is obvious that the Minister has the responsibility to decide whether he or she is satisfied with the identity of a foreign national; that does not mean that he or she has the burden to travel around the world to gather information to establish that identity. In my view, there is no doubt that the responsibility to establish the identity of a foreign national rests on the foreign national himself. Obviously, when such foreign national provides documents, the Minister will do whatever he or she can to verify and to become satisfied with the identity of the foreign national. The burden is not displaced from the foreign national to the Minister but the sole responsibility rests with the foreign national. In the case at bar, the foreign national provided on numerous occasions, different information regarding his identity, most of it being fake or fabricated. The fact that he cannot provide a valid document to prove his identity does not mean that he should seek out a third party to testify about his identity; if the respondent did ever live in India, traces should exist about his life over there and it should be relatively easy to find such documents, a responsibility which lies with the foreign national, not the Minister (emphasis added).

In this case, the documents produced by the applicant were examined by the CBSA and it was based on this expertise and the inconsistencies noted between the documents examined and the information provided by the applicant that the RAD came to its conclusion to uphold the

decision of the RPD, the applicant having failed to establish his identity on a preponderance of the evidence. The intervention of this Court is therefore not warranted.

[47] The applicant further submits that the Minister of Citizenship and Immigration was satisfied with the evidence adduced by the applicant to establish his identity and subsequently issued him a "Refugee Protection Claimant Document" under the name of Alonzo Mpaka, namely, the person he claims to be (AR page 50). I would first note that this document is not included in the Certified Tribunal Record. Thus, it cannot be considered for the purposes of this judicial review. Having said that, I do have a few comments in regard to the said document. Despite the existence of this document, as mentioned above, according to Rule 11 of the *Refugee Protection Division Rules*, the applicant must establish his identity before the RPD. I would further note that the Minister intervened before the RPD via a filing of documents, but without appearing at the hearing, which shows that the Minister had doubts about the applicant's identity (CTR at pages 226-229). In addition, an officer of Citizenship and Immigration Canada wrote, in a document entitled "Recommendation for Detention" that the applicant has not satisfied the officer as to his identity and recommended that he be detained pending confirmation of his identity. That document was issued on the same date as the "Refugee Protection Claimant Document" submitted by the applicant, namely, on January 20, 2014. Moreover, the signature of the Minister's representative found on the "Refugee Protection Claimant Document" is the same as the one on the "Recommendation for Detention" which shows that both documents were issued by the same person. Thus, despite the fact that the "Refugee Protection Claimant Document" was issued to the applicant in the name of Alonzo Mpaka, contrary to the applicant's

claims, he cannot say that the Minister would have been satisfied by the evidence that the applicant was in fact Alonzo Mpaka.

[48] At the hearing, counsel for the applicant emphasized the RAD's lack of analysis of the applicant's nationality certificate (CTR at page 176), which was, in his view, the best possible identity document a person could possess. In its decision, the RAD indicated in its analysis that its comments with respect to the excerpts of the applicant's birth certificate could be applied to his nationality certificate as well (AR page 17 at para 51). I am therefore of the view that, contrary to the applicant's argument, the RAD considered the document and noted that the CBSA's findings with regard to the applicant's birth certificate were also applicable to the nationality certificate, i.e. that on its own, such a document could not establish an individual's identity. In addition, a reading of the CBSA's expert analysis of the document, to which the RAD refers (AR page 17 at para 48), points out that it could not be determined whether the document had been fraudulently obtained (CTR page 238). The RAD added that the document had been published after the applicant had arrived in Canada (*Ibid*). Indeed, this document was published on November 18, 2013, even though the applicant arrived in Canada in September 2013. The RAD therefore assessed the document and the analysis of it conducted by the CBSA. The Court's intervention is not warranted.

[49] The RAD further noted in its analysis of the applicant's birth certificate that the applicant's purported mother was a homemaker, while at the hearing before the RPD, the applicant indicated that his mother was a civil servant (AR, RAD Decision, page 17 at para 50). In his affidavit, the applicant stated that his mother was in fact a teacher, and that the term

"homemaker" was used as a [TRANSLATION] "catch-all" to designate a woman's profession when her exact profession was unknown (AR, Applicant's affidavit, page 25 at para 25). Given the contradictory information regarding the career of the applicant's mother, it was reasonable for the RAD to doubt the applicant's claims.

[50] I would also note that the applicant appears to have three separate identities. The applicant claims that he is really Alonzo Mpaka. He asserts that he was persecuted under that name in the DRC. He also has an identity as Morangwa Malambu, the name he alleges he used to flee the DRC for France. In addition, he has a third identity under the name "Tsemengu", which was apparently the name he used to cross the border between the United States and Canada (CTR, RPD Decision, page 67 at para 10). No documentation has been submitted in support of this third identity. Given that two of the documents regarding the identity of Alonzo Mpaka were considered to be genuine and unaltered by the CBSA's expert analysis, namely, a nationality certificate and an excerpt of a birth certificate, and that the applicant's passport under the name of Morangwa Malambu was also deemed to be genuine and unaltered and that it was under this identity (Morangwa Malambu) that the applicant claimed asylum in France, which was denied on the ground that his fear of persecution was not sufficiently founded (AR, Applicant's affidavit, Tab 4 pages 20-21 at para 9), that he had lived in France from 2000 to 2013 under that name, and that he travelled to the DRC under that identity in March 2013, it was reasonable for the RAD to conclude that the applicant had not established his identity as Alonzo Mpaka.

[51] As for the applicant's alleged trip to the DRC in March 2013, the RAD adequately assessed the evidence adduced and correctly determined that, given the doubts as to the

applicant's identity and his testimony on this at the hearing before the RPD, it was reasonable to conclude that the applicant had not discharged his burden of establishing that fact (*Matingou*, above at para 2). According to his version, the applicant had travelled to the DRC in March 2013 with his passport under the name of Morangwa Malambu. Yet his passport contains no stamps from that trip. As has been emphasized in *Singh*, above at paragraph 38, the onus rests with the applicant to submit the necessary documents showing the trip, which he failed to do in this case. The RAD in fact noted that the applicant had not produced any airline ticket or boarding pass as evidence that he had travelled to the DRC in March 2013. The RAD further stated that the applicant's passport contained no trace of the alleged trip (AR, RAD Decision, pages 19-20 at para 56). Once again, the decision of the RAD on this point is reasonable.

[52] It was therefore based on its own analysis of the documentation submitted by the applicant and the inconsistencies raised that the RAD upheld the decision of the RPD, namely, that the applicant had not established his identity on a balance of probabilities. It conducted its own analysis and made its own determinations, confirming the decision of the RPD. Consequently, the RAD's decision is reasonable.

## IX. Conclusion

[53] The RAD made the decision not to hold a hearing on the basis that there was no new evidence in the record. Following its own assessment of the evidence, the RAD reasonably concluded that it would uphold the RPD's decision that the applicant had failed to establish his identity on a balance of probabilities. The intervention of this Court is not warranted.

[54] In his additional submissions, the applicant proposed the following question for certification:

> For the purposes of applying subsection 110(6) of the IRPA, where a serious issue pertaining to a claimant's credibility arises before the RAD, could the documentary evidence that may point to a possibility of holding a hearing: (1) include evidence already contained in the record before the RPD referred to in subsection 110(3) of the IRPA but that was not considered or was not adequately considered by the RPD; or (2) is it strictly limited to documentary evidence that is the subject of subsection 110(4) of the IRPA, to the exclusion of evidence that was already in the record that was heard by the RPD?

[55] The respondent replies to the certification of this question by arguing that sections 110 and 111 of the IRPA are clear, namely, that new evidence has to be submitted under subsection 110(4) of the IRPA in order for the RAD to hold a hearing. Given that there is no new evidence in this case, the question submitted is not relevant to this case. Accordingly, it cannot be certified.

[56] The principles that govern the certification of a question under paragraph 74(d) of the IRPA were established by the Federal Court of Appeal. In order to certify a question, the judge must find that it "transcends the interests of the immediate parties to the litigation and contemplates issues of broad significance or general application" (*Canada (Minister of Citizenship and Immigration) v Liyanagamage*, [1994] FFJ No 1637, 176 NR 4 at paras 4-6). The question must be a serious one that is dispositive of the appeal (*Varela v Canada (Minister of Citizenship and Immigration)*, 2009 FCA 145 at paras 22-29).

[57] That said, "the Court will not proceed to simply validate the certified questions suggested by the parties: further analysis is required if the "gatekeeper function", as qualified in *Varela*, at para 43, is to be taken seriously. Such is the role of this Court in determining certified questions" (*Harkat (Re)*, 2011 FC 75 at para 13; see also *Galvez Padilla v Canada (Minister of Citizenship and Immigration)*, 2013 FC 247 at para 87).

[58] In this case, there is no need for the proposed question to be certified.

[59] Indeed, counsel for the applicant acknowledged at the hearing and in his additional submissions that, upon reading sections 110 and 111 of the IRPA, it is necessary to present new evidence before the RAD in order for it to consider granting a hearing if an appellant so requests. The applicant submitted no new evidence to the RAD. Nor did the applicant cite any case law contradicting the decisions of this Court in *Sajad*, *Yin*, *Bui* and *Djossou*, above, which explain the need for new evidence to be adduced for the RAD to be able to decide to grant a hearing to an appellant who so requests.

[60] Further, if one were to respond in the affirmative to part (1) of the question proposed for certification by the applicant, subsection 111(2) of the IRPA would lose all of its meaning. Indeed, according to this subsection, the RAD may only refer the decision, if it is of the opinion that "the decision of the Refugee Protection Division is wrong in law, in fact or in mixed law and fact" and "it cannot make a decision under paragraph 111(1)(*a*) or (*b*) without hearing evidence that was presented to the Refugee Protection Division". The answer to the first part of his question therefore lies within subsection 111(2) itself.

[61] Part (2) of the proposed question is not determinative of this case either: as mentioned above, the applicant's counsel himself acknowledged that new evidence was necessary in order for the RAD to consider holding a hearing and there was no new evidence in this case.

[62] More importantly here, however, the facts put forth by the applicant to establish his identity or to show that he was in need of protection are simply not credible. What the applicant is seeking in a new hearing, in order to adjust his testimony in an attempt to restore his credibility. The facts, as related above, speak for themselves. The RPD did not believe him, nor did the RAD, and the undersigned finds that the conclusion of the RAD is reasonable. On that basis, it would be inappropriate to certify a question in such circumstances. The applicant had an opportunity to be heard on two occasions, and in this proceeding, a third time. His credibility was fatally called into question. Hence the reasonableness of the RAD's decision, which eloquently characterized the credibility with respect to the facts put forward by the applicant as being nil.

[63] Thus, in light of all of the facts of this case and the foregoing analysis, and given these circumstances, the question cannot be certified.

**JUDGMENT**

**THE COURT ORDERS AND ADJUDGES** that:

1. The judicial review application is dismissed;

2. No question is certified.

"Simon Noël"

Judge

Certified true translation
Sebastian Desbarats, Translator

**FEDERAL COURT**

**SOLICITORS OF RECORD**

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| **DATED:** | JUNE 17, 2015 |

**APPEARANCES:**

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