Federal Court  Cour fédérale

Date: 20150721

Docket: IMM-2798-14

Citation: 2015 FC 890

Ottawa, Ontario, July 21, 2015

PRESENT: The Honourable Mr. Justice Boswell

BETWEEN:

MEVLAN TOTA

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Introduction and Background

[1] This is an application for judicial review of a decision by the Refugee Appeal Division [RAD] of the Immigration and Refugee Board [IRB]. It raises several issues which will be identified below after the following summary of the background to this matter.

[2] The Applicant is a citizen of Albania who claims to fear persecution in that country because he has actively supported the Socialist Party. He alleges that he recruited voters from among Albanian expatriates living in Italy, and was consequently threatened by Democratic Party supporters in both Albania and Italy. He also claims that he was injured at a demonstration on January 21, 2011, and that his car was set on fire outside of his family home on April 24, 2013.

[3] Using a fake Italian passport, he travelled to Canada on May 10, 2013, and asked for refugee protection the same day. At his first hearing before the Refugee Protection Division [RPD] of the IRB on July 25, 2013, questions about the Applicant's fake passport revealed that he had first gone to Italy in 1991 and received a "permission to stay" document which expired every three years. After about 10 years of continuously living in Italy, he said that he "obtained one without an expiry date," and this document allowed him to do "everything in Italy, work, go to the hospital, live there." This raised the prospect of exclusion under article 1E of the *Convention Relating to the Status of Refugees*, 189 UNTS 150, Can TS 1969 No 6 [*Convention*], which provides that the *Convention* "shall not apply to a person who is recognized by the competent authorities of the country in which he has taken residence as having the rights and obligations which are attached to the possession of the nationality of that country." The hearing was therefore adjourned to allow the Applicant to present a copy of his *carta di soggiorno per strainieri – a tempo indeterminado*, which was subtitled in English as: "foreigner's permit of stay – permanent."

[4] Following a second hearing held on September 20, 2013, the RPD decided to dismiss the Applicant's claim for protection. In its decision dated December 2, 2013, the RPD paraphrased the test for article 1E exclusion from *Canada (Citizenship and Immigration) v Zeng*, 2010 FCA 118 at paragraph 28, [2011] 4 FCR 3 [*Zeng*], and determined that the Applicant's status in Italy was substantially similar to that of a citizen. Although the Applicant tried to qualify his earlier statement that he could do "everything in Italy" by saying he would not be eligible for social assistance and could not study in Italy, the RPD rejected this testimony because the Applicant had no personal knowledge of that and it was inconsistent with the documentary evidence.

[5] The RPD also rejected the Applicant's argument that he would be unable to keep the status he had in Italy. Although a stamp on his *carta di soggiorno* was interpreted as saying that "this document is subject to renewal in 10 years from the first renewal date," the RPD was not satisfied that this meant it had an expiry date. The documentary evidence did not indicate any specific requirements for renewing a *carta di soggiorno*, and the RPD was not satisfied that the Applicant met any of the conditions which could cause him to lose the permanent resident status conferred by the document.

[6] The RPD thus concluded that it did not need to consider any risk in Albania, and instead assessed whether the Applicant would be at risk in Italy. Although the Applicant had received threatening phone calls while in Italy, the RPD determined that the Italian state could adequately protect him and he could apply for asylum in Italy if necessary. The RPD therefore found that the Applicant was excluded from protection by article 1E and rejected his claim.

[7] The Applicant appealed the RPD's decision to the RAD of the IRB, and he sought to introduce a police report, a fully translated copy of his *carta di soggiorno*, and articles relating to the status it conferred. He also stated in his written submissions that, "[g]iven that the appellant wishes to present new evidence, the appellant requests an oral hearing." The RAD dismissed the Applicant's appeal in respect of the RPD's decision, and confirmed that he was excluded from refugee protection by article 1E of the *Convention* and section 98 of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [*Act*]. The Applicant now seeks judicial review of the RAD's decision pursuant to subsection 72(1) of the *Act*. He asks the Court to set aside the RAD's decision and return the matter to a different panel of the RAD for re-determination.

II. Issues

[8] This application raises the following issues:

1. What standard of review by this Court applies to the RAD's decision?
2. Did the RAD apply an appropriate standard of review to the RPD's decision?
3. Did the RAD err by not holding an oral hearing?
4. Did the RAD err by excluding the Applicant's new evidence?
5. Was the RAD's determination that the Applicant was excluded by article 1E reasonable?

III. The RAD Decision under Review

[9] In its decision dated March 20, 2014, the RAD began by stating that the Applicant "did not request an oral hearing." Next, the RAD considered whether to admit the Applicant's new

evidence, and it adopted the same test for admitting new evidence as used in a pre-removal risk assessment [PRRA] because of the similarities between subsection 110(4) and paragraph 113(a) of the *Act*. The RAD therefore applied the principles from *Raza v Canada (Citizenship and Immigration)*, 2007 FCA 385 at paragraph 13, 289 DLR (4th) 675 [*Raza*], and rejected the proposed new evidence for the following reasons: (1) the police report related to the Applicant's situation in Albania and would only be relevant if the exclusion issue was wrongly decided; (2) the translated *carta di soggiorno* was neither new nor material since the information was before the RPD anyway, and a translation could have been supplied had the Applicant wanted; and (3) all the articles were either undated or pre-dated the Applicant's claim, and did not apply to someone who already had permanent status in Italy.

[10] As for the standard of review, the RAD applied the framework set out in *Newton v Criminal Lawyers' Trial Association*, 2010 ABCA 399, 38 Alta LR (5th) 63 [*Newton*]. Because the RAD generally cannot hold a hearing and the RPD is in a better position to assess credibility and make findings of fact, the RAD decided it should defer to such findings. The RAD therefore adopted the reasonableness standard when reviewing the RPD's application of article 1E to the Applicant's circumstances since it is a question of mixed fact and law.

[11] The RAD found that "the RPD specifically mentioned *Zeng* in its reasons and applied it correctly," and explained that finding by emphasizing the Applicant's initial testimony that his *carta di soggiorno* allowed him to do "everything in Italy, work, go to the hospital, live there." The RAD decided that the Applicant had this status on the day he made his refugee claim and had never lost it. The RAD was skeptical of the Applicant's claim that his permanent status

would eventually need to be renewed, but even if that were true it would not expire until 2016. The RAD said that the *Zeng* test does not require the RPD to predict the future, and concluded that the outcome was reasonable.

[12] The RAD also rejected the Applicant's comparison of his case to a different RPD decision by panel member Fainbloom, where a similar status in Italy had been considered. The RAD distinguished that other RPD decision since it involved claimants who had lost their status in Italy by the time of the hearing, and had presented evidence showing: (1) that they would be prevented from renewing their status because of employment discrimination against Muslims; and (2) that other people had been expelled from Italy in similar circumstances. In those circumstances, member Fainbloom applied *Shamlou v Canada (Minister of Citizenship and Immigration)* (1995), 103 FTR 241 at paragraphs 35-36, 32 Imm LR (2d) 135 (TD) [*Shamlou*] because: "[i]f the applicant has some sort of temporary status which must be renewed, and which could be cancelled … clearly the applicant should not be excluded under Art. 1E." In this case though, the RAD found that *Shamlou* did not apply since the Applicant's status was permanent, had not been cancelled, and he had not presented evidence showing either employment discrimination or the fate of any similarly-situated persons in Italy.

[13] The RAD stated that the onus was on the Applicant to prove that his status could have been revoked (citing *Shahpari v Canada (Minister of Citizenship and Immigration)* (1998), 146 FTR 102 at paragraph 11, 44 Imm LR (2d) 139 (TD)), and concluded as follows:

> [64] Based on a review of the totality of the evidence, I find that the Appellant has not established, on a balance of probabilities, that he will be unable to access employment and that his status would be lost as a result. In the meantime, his current status has

> not been lost and the evidence seems to indicate that it will be renewable upon expiry in 2016.

[14] The RAD therefore confirmed the RPD's determination that the Applicant was excluded from protection by article 1E of the *Convention* and section 98 of the *Act*.

IV. Analysis

A. *What standard of review by this Court applies to the RAD's decision?*

[15] The Applicant submits that it is appropriate for this Court to decide the scope of the RAD's review on the correctness standard, since it is a question of general importance to the legal system that affects thousands of refugee claimants every year (citing *Dunsmuir v New Brunswick*, 2008 SCC 9 at paragraph 55, [2008] 1 SCR 190) [*Dunsmuir*].

[16] The Respondent submits that every issue in this application, including the Court's review of the RAD's decision, should be reviewed on the reasonableness standard. The question about the scope of the RAD's review primarily involves the interpretation of the RAD's home statute, and the Respondent says it should not lightly be disturbed (citing e.g. *Alberta (Information and Privacy Commissioner) v Alberta Teachers' Association*, 2011 SCC 61 at paragraphs 34 and 45-46, [2011] 3 SCR 654 [*Alberta Teachers*]; and *Akuffo v Canada (Citizenship and Immigration)*, 2014 FC 1063 at paragraphs 17-26, 31 Imm LR (4th) 301 [*Akuffo*]).

[17] The standard for this Court's review of the RAD's determination as to the scope of its review of RPD decisions is open to some question. As noted by Mr. Justice Simon Noël in *Yin v*

Canada (Citizenship and Immigration), 2014 FC 1209 at paragraph 32 [*Yin*], the case law diverges on this subject. Some decisions state that the correctness standard applies, either because the issue is one of central importance to the legal system and outside of the RAD's expertise, or because it affects the jurisdictional lines between the RPD and the RAD (e.g. *Huruglica v Canada (Citizenship and Immigration)*, 2014 FC 799 at paragraphs 25-34, [2014] 4 FCR 811 [*Huruglica*]; *Spasoja v Canada (Citizenship and Immigration)*, 2014 FC 913 at paragraphs 7-8 [*Spasoja*]; *Dunsmuir* at paragraphs 60-61). Other cases disagree and say it is no more than a question of interpreting the RAD's home statute, which presumptively attracts the reasonableness standard (*Akuffo* at paragraphs 16-26; *Djossou v Canada (Citizenship and Immigration)*, 2014 FC 1080 at paragraphs 13-37 [*Djossou*]; *Brodrick v Canada (Citizenship and Immigration)*, 2015 FC 491 at paragraphs 20-29 [*Brodrick*]; *Dunsmuir* at paragraph 54; *McLean v British Columbia (Securities Commission)*, 2013 SCC 67 at paragraphs 26-33, [2013] 3 SCR 895 [*McLean*]). Questions on this issue have been certified in several of these cases and the appeal from *Huruglica* has now been scheduled, so this division in the case law will soon be considered by the Federal Court of Appeal.

[18] In the meantime, I agree with Mr. Justice Luc Martineau's pragmatic approach to the issue in *Alyafi v Canada (Citizenship and Immigration)*, 2014 FC 952 at paragraphs 46-52 [*Alyafi*]. As he notes and as I will summarize below, the case law is divided on the scope of review the RAD should apply. This creates a problem similar to one this Court once faced with respect to the residency test for citizenship (*Huang v Canada (Citizenship and Immigration)*, 2013 FC 576 at paragraphs 1, 24-25, [2014] 4 FCR 436). If the correctness standard is applied by every judge of this Court, the RAD could diligently follow one line of cases only to see its

decisions set aside whenever they are reviewed by a judge who favours the other line of cases. The law requires more certainty than that lest it revert to being, as John Selden quipped centuries ago, "a Chancellor's foot; what an uncertain measure would this be? One Chancellor has a long foot, another a short foot, a third an indifferent foot." Similarly, the Federal Court of Appeal observed in *Wilson v Atomic Energy of Canada Limited*, 2015 FCA 17 at paragraph 52, 467 NR 201 [*Wilson*], that the rule of law demands that "the meaning of a law should not differ according to the identity of the decision-maker." The Federal Court cannot fix the problem at the RAD level so long as the judges of this Court disagree on the solution, and applying the correctness standard in this situation would undermine the rule of law (*Wilson* at paragraph 52). Consequently, Justice Martineau concluded in *Alyafi* that decisions of the RAD should be upheld so long as either of the two approaches currently accepted by the Court is applied by the RAD. Adopting such an approach in this case, I find that the RAD's decision should be reviewed on a standard of reasonableness.

[19] This standard also applies to the RAD's factual findings, and its assessment of the evidence before it is entitled to deference (see: *Dunsmuir* at paragraph 53; *Yin* at paragraph 34; *Akuffo* at paragraph 27; *Mohajed v Canada (Citizenship and Immigration)*, 2015 FC 690 at paragraph 14). The RAD's decision should therefore not be disturbed so long as it is justifiable, intelligible, transparent, and defensible in respect of the facts and the law (*Dunsmuir* at paragraph 47). Those criteria are met if "the reasons allow the reviewing court to understand why the tribunal made its decision and permit it to determine whether the conclusion is within the range of acceptable outcomes" (*Newfoundland and Labrador Nurses' Union v Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62 at paragraph 16, [2011] 3 SCR 708).

B. *Did the RAD apply an appropriate standard of review to the RPD's decision?*

[20] The Applicant contends that the RAD's decision must be set aside since the RAD should have applied a correctness standard to the RPD's decision. Specifically, the Applicant argues that the RAD is simply duplicating the role of this Court by applying the reasonableness standard, which is inconsistent with the RAD's greater expertise and its ability to substitute a determination that, in its opinion, should have been made (citing *Act*, s 111(1)(b)).

[21] The Respondent contends that it was appropriate for the RAD to apply the reasonableness standard and defer to the RPD's determinations. The Respondent points out that the RAD has a limited ability to accept new evidence or hold a hearing (*Act*, ss 110(3), (4) and (6)), and appellants are required to specifically identify errors (*Refugee Appeal Division Rules*, SOR/2012-257, ss 3(3)(g), and 9(2)(f) [*RAD Rules*]). In contrast, the RPD hears an applicant's testimony and plays a much more active role in generating the evidentiary record. The Respondent does acknowledge that some cases have said the degree of deference depends on the extent to which the RPD has some advantage over the RAD in answering a question of fact (citing e.g. *Huruglica* at paragraphs 54-55). However, the Respondent favours the view that the "palpable and overriding error" standard should be applied to all findings of fact (citing e.g. *Spasoja* at paragraph 39), and submits that such a standard is functionally equivalent to the reasonableness standard (citing *HL v Canada (AG)*, 2005 SCC 25 at paragraph 110, [2005] 1 SCR 401).

[22] As mentioned above, the judges of this Court disagree on the correct interpretation of the RAD's standard of review in respect of the RPD's findings of fact and mixed fact and law. One

line of cases concludes that the RAD should review the RPD's findings of fact for palpable and overriding errors (see e.g.: *Eng v Canada (Citizenship and Immigration)*, 2014 FC 711 at paragraphs 26-34; *Spasoja* at paragraphs 14-46; and *Triastcin v Canada (Citizenship and Immigration)*, 2014 FC 975 at paragraphs 27-28). Another line of cases concludes that the RAD must independently come to a decision and is not limited to intervening on the standard of palpable and overriding error, although it can "recognize and respect the conclusion of the RPD on such issues as credibility and/or where the RPD enjoys a particular advantage in reaching such a conclusion" (*Huruglica* at paragraph 55; *Yetna v Canada (Citizenship and Immigration)*, 2014 FC 858 at paragraphs 16-20; *Akuffo* at paragraph 39; *Ozdemir v Canada (Citizenship and Immigration*), 2015 FC 621 at paragraph 3).

[23] In this case, the RAD looked to the Alberta Court of Appeal's decision in *Newton* to determine that the reasonableness standard applied to the findings of the RPD. In this regard, the RAD stated as follows:

> [40] *Newton* adopts the definition of "reasonableness" in *Dunsmuir*. Reasonableness is concerned mostly with the existence of justification, transparency and intelligibility within the decision-making process and, if the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law.
>
> [41] In the case at hand, the application of Article 1E to the Appellant's particular situation presents a question of mixed fact and law. Therefore, the RAD [owes] deference to the RPD findings on this question, and will consider whether the findings meet the reasonableness test.

[24] Both lines of cases noted above have condemned this approach by the RAD (see e.g. *Alyafi* at paragraphs 17-18, 39 and 46; *Huruglica* at paragraphs 45 and 54; *Spasoja* at

paragraphs 12-13, 19-25 and 32-38; *Djossou* at paragraph 37; *Brodrick* at paragraphs 32-34; and *Ching v Canada (Citizenship and Immigration)*, 2015 FC 725 at paragraphs 48, 50 [*Ching*]). The RAD has an appellate function, and it cannot limit its analysis merely to whether the RPD acted reasonably and reached a decision that fell within the range of acceptable outcomes which are defensible in respect of the facts and the law. Applying the reasonableness standard when reviewing RPD decisions, as the RAD did in this case, is typically an unreasonable error of law (*Siliya v Canada (Citizenship and Immigration)*, 2015 FC 120 at paragraph 23).

[25] However, that need not always end the matter (see e.g. *Pataraia v Canada (Citizenship and Immigration)*, 2015 FC 465 at paragraphs 13-14 [*Pataraia*]; *Ali v Canada (Citizenship and Immigration)*, 2015 FC 500 at paragraphs 8-9 [*Ali*]). The issue is whether relief should be withheld in the face of such an error (see: *Lemus v Canada (Citizenship and Immigration)*, 2014 FCA 114 at paragraph 38, 372 DLR (4th) 567), which in turn reduces to this question: might the RAD have reached a different result had it selected an appropriate standard of review?

[26] On one hand, the RAD often refers to the reasonableness standard in its decision and stated (at paragraph 56) that: "the RPD's finding fell within a range of possible, acceptable outcomes which are defensible in respect of the facts and law."

[27] On the other hand, the RAD also stated the following: "the RPD specifically mentioned *Zeng* in its reasons and applied it correctly" (emphasis added); "[t]he Appellant's testimony and the documentary evidence in record clearly shows that the Appellant had permanent resident status [in Italy] on the day he claimed protection in Canada and on the day his claim was heard";

and there was no "evidence to indicate that the Appellant has lost his right to re-enter Italy or to his permanent residence status." Most tellingly, the RAD concluded as follows:

> [64] Based on a review of the totality of the evidence, I find that the Appellant has not established, on a balance of probabilities, that he will be unable to access employment and that his status would be lost as a result. In the meantime, his current status has not been lost and the evidence seems to indicate that it will be renewable upon expiry in 2016.

The foregoing indicates that the RAD independently weighed all the evidence, which is ultimately all that even *Huruglica* requires. Other judges of this Court have declined to intervene with a RAD decision where it appears that the RAD has fully considered the evidence, even where the RAD has formally applied the reasonableness standard (*Akuffo* at paragraphs 46-49; *Yin* at paragraph 37; *Pataraia* at paragraphs 17-18; *Ali* at paragraphs 8-9).

[28] Consequently, although the RAD adopted a reasonableness standard to its review of the RPD's decision, it did not unreasonably defer to the RPD's assessment of the facts and application of the article 1E exclusion. On the contrary, it is apparent from its reasons as noted above that the RAD independently reviewed and assessed all of the evidence.

C. *Did the RAD err by not holding an oral hearing?*

[29] The Applicant contends that the RAD was wrong to say that he never requested an oral hearing, and therefore submits that the RAD's decision refusing his new evidence cannot stand.

[30] I agree that the RAD was mistaken when it said (at paragraph 10) that the Applicant "did not request an oral hearing pursuant to ss. 110(6)" of the *Act*. The Applicant clearly asked for an

oral hearing in a written statement as required by subparagraphs 3(3)(d)(ii) and (iii) of the *RAD Rules*. The RAD's failure to consider granting a hearing when it was directly raised by the Applicant is potentially an error (*Turner v Canada (AG)*, 2012 FCA 159 at paragraphs 41-42, 431 NR 327).

[31] In this case though, the Applicant did not comply with subparagraph 3(3)(g)(v) of the *RAD Rules*; this subparagraph requires an appellant to make "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." In this case, the Applicant merely mentioned his request for a hearing in his written statement and did not present any submissions on this issue in his memorandum for the RAD, let alone "full and detailed" ones. Having failed to properly argue the issue at first instance, it is inappropriate for the Applicant to complain about the RAD's oversight now (*Alberta Teachers* at paragraphs 22-23).

[32] Furthermore, the alleged error could not affect the disposition of this application for judicial review. The RAD's ability to hold a hearing is circumscribed by subsection 110(6) of the *Act*, which precludes a hearing unless there is "documentary evidence referred to in subsection (3)." Subsection 110(3) of the *Act* provides that the RAD "may accept documentary evidence and written submissions from the Minister and the person who is the subject of the appeal," but evidence from the latter must meet the conditions prescribed by subsections 110(4) or (5). As the RAD refused to accept the Applicant's new evidence, it would have had no choice but to refuse an oral hearing (*Yin* at paragraph 39; *Sajad v Canada (Citizenship and Immigration)*, 2014 FC 1107 at paragraph 17; *Balde v Canada (Citizenship and Immigration)*,

2015 FC 624 at paragraphs 30-32; *Ching* at paragraph 63). Thus, this application for judicial review should not be granted on this ground alone.

D. *Did the RAD err by excluding the Applicant's new evidence?*

[33] As to the Applicant's submission that the RAD's decision refusing his new evidence cannot stand, the question to address in this regard is whether the RAD erred by adopting the test in *Raza* to reject the Applicant's new evidence.

[34] Except when responding to evidence introduced by the Minister, a refugee claimant can only present new evidence to the RAD when permitted by subsection 110(4) of the *Act*, which provides that:

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.

The test for admitting new evidence is thus a question of statutory interpretation, a task which "requires that the words of an Act be interpreted 'in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament' " (*Imperial Oil v Jacques*, 2014 SCC 66 at paragraph 47, [2014] 3 SCR 287). To date, this Court has applied the reasonableness standard of review when assessing this issue, essentially because it is a question involving the RAD's home statute and is not of central

importance to the legal system (*Singh v Canada (Citizenship and Immigration)*, 2014 FC 1022 at paragraphs 39-42 [*Singh*]; *Iyamuremye v Canada (Citizenship and Immigration)*, 2014 FC 494 at paragraph 45 [*Iyamuremye*]; *Denbel v Canada (Citizenship and Immigration)*, 2015 FC 629 at paragraph 29 [*Denbel*]).

[35] In this case, the RAD's decision to adopt the *Raza* criteria was based on the fact that subsection 110(4) is very similar to paragraph 113(a) of the *Act*, the latter of which states as follows:

113. … *(a)* an applicant whose claim to refugee protection has been 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;	**113.** … *a)* le demandeur d'asile débouté ne peut présenter que des éléments de 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;

[36] In *Iyamuremye*, Mr. Justice Michel Shore briefly commented on this issue and concluded (at paragraph 45) it was reasonable "for the RAD to have referred to the factors set out in *Raza*, above, to analyse the admissibility of fresh evidence." This, he said, is "consistent with Parliament's clear intention with regard to subsection 110(4) to require that the RAD review the RPD's decision as is, unless new, credible and relevant evidence arose after the rejection, that might have affected the outcome of the RPD hearing if that evidence had been presented to it" (emphasis omitted). Mr. Justice Michael Manson also approved the use of the *Raza* criteria in *Ghannadi v Canada (Citizenship and Immigration)*, 2014 FC 879 at paragraphs 14 and 17 [*Ghannadi*], as did Mr. Justice Richard Mosley in *Denbel* at paragraph 43.

[37] However, in *Singh* (at paragraphs 44-58), Madam Justice Jocelyne Gagné disagreed. She held that applying the *Raza* test under subsection 110(4) was unreasonable for essentially three reasons: (1) most of the criteria set out in *Raza* were implied not from the language of paragraph 113(a) but from the role of a PRRA in assessing only new risks arising after the last refugee determination, which is significantly different from the "full, fact-based appeal" expected when the RAD reviews the correctness of the RPD's decision; (2) the introduction of new evidence is the gateway to an oral hearing, which could lead to procedural inequity if the admissibility requirements are too strict; and (3) the timelines at the RPD are much shorter than they used to be, and applicants should have an opportunity to correct any weaknesses the timelines might cause to their evidentiary record at the RPD.

[38] The interpretation of subsection 110(4) in *Singh* is persuasive, but "under reasonableness review, we defer to *any* reasonable interpretation adopted by an administrative decision maker, *even if* other reasonable interpretations may exist" (*McLean* at paragraph 40, emphasis added). For the following reasons, I am not convinced that the RAD's interpretation of subsection 110(4) was unreasonable.

[39] Subsection 110(4) was only enacted in 2010 by the *Balanced Refugee Reform Act*, SC 2010, c 8, s 13(2). This was well after *Raza* was decided, and a well-established principle of statutory interpretation is that "the legislature is presumed to have a mastery of existing law, both common law and statute law" (*ATCO Gas & Pipelines Ltd v Alberta (Energy & Utilities Board)*, 2006 SCC 4 at paragraph 59, [2006] 1 SCR 140). Of course, Parliament cannot be deemed to have endorsed the judicial interpretation of paragraph 113(a) in *Raza* merely by introducing a

similar provision (*Interpretation Act*, RSC 1985, c I-21, s 45(4)), but the timing of its introduction can still be a fairly strong indication of legislative intent. As put by Mr. Justice Marshall Rothstein in *Li v Canada (Minister of Citizenship and Immigration)*, 2005 FCA 1 at paragraph 27, [2005] 3 FCR 239, "[w]hen a statutory provision appears to be modelled on existing legislation, whether from the same or another jurisdiction, interpretation of the model legislation is presumed to have been known and taken into account in drafting the new legislation."

[40] Furthermore, except where the context indicates otherwise, "[g]iving the same words the same meaning throughout a statute is a basic principle of statutory interpretation" (*R v Zeolkowski*, [1989] 1 SCR 1378 at 1387, 61 DLR (4th) 725; *Thomson v Canada (Deputy Minister of Agriculture)*, [1992] 1 SCR 385 at 400, 89 DLR (4th) 218); and the "fact that … two sections are remarkably similar and fulfil comparable roles should be taken into account when interpreting them" (*Dickason v University of Alberta*, [1992] 2 SCR 1103 at 1121, 95 DLR (4th) 439).

[41] The overall objective is always to discern the meaning of the words used by Parliament in their total context. After all, "[b]oth the drafter of legislation and its official interpreters carry out their tasks with shared expectations about how the other will do their work" (Ruth Sullivan, *Construction of Statutes*, 6th ed (Markham, ON: LexisNexis, 2014) at paragraph 8.7). Drafters of legislation do not have an easy job; they must capture the essence of their instructions as concisely as possible, all the while knowing that it is "not enough to attain to a degree of precision which a person reading in good faith can understand, but you must attain, if you can, to

a degree of precision which a person reading in bad faith cannot misunderstand. It is all the better if he cannot pretend to misunderstand it" (*In re Castioni*, [1891] 1 QB 149, [1886-90] All ER Rep 640, Stephen J; see also *Alberta (Treasury Branches) v MNR*; *Toronto-Dominion Bank v MNR*, [1996] 1 SCR 963 at paragraph 15, 133 DLR (4th) 609).

[42] It would therefore be surprising if a drafter, instructed to craft a provision that is substantially more lenient than paragraph 113(a) of the *Act* and aware of *Raza*, would make no attempt to distinguish subsection 110(4) from paragraph 113(a) at all. Yet, that is what the interpretation in *Singh* implies. It is not unreasonable for the RAD to reject that implication and instead find, as Justice Mosley did in *Denbel* at paragraph 43, that " [i]f Parliament had intended to establish more flexible admissibility rules in RAD appeals, it would not have replicated the restrictive language which governs PRRAs."

[43] Moreover, the approach in *Singh* is contingent on Justice Gagné's observation (at paragraph 51) that "[t]he RAD … considers [new] evidence in a very different light than does the PRRA officer; it is doing so in an appellate review of the correctness of the RPD's determination" (emphasis in original). Thus, Justice Gagné's contextual analysis depends on the *Huruglica* framework which was adopted in *Akuffo* (at paragraph 39). If the RAD were to instead follow *Spasoja* (which, under *Alyafi*, it would be entitled to do), then a restrictive approach to new evidence would be consistent with Parliament's intent to create a "true appeal" (see *Spasoja* at paragraphs 29 and 39; *Palmer v The Queen* (1979), [1980] 1 SCR 759 at 775, 106 DLR (3d) 212). Indeed, at least one RAD member has decided that the nature of a RAD appeal should vary depending on the presence and nature of new evidence (*Re X*, 2015 CanLII 19235 at

paragraphs 69-71 (CA IRB) (18 February 2015)), a conclusion which could also reasonably support more stringent admissibility requirements.

[44] Furthermore, the *Raza* criteria are not entirely indifferent to the context of an appeal to the RAD even under the *Huruglica* approach. No matter what standard the RAD applies when reviewing the RPD's findings of fact, subsection 110(4) is likely intended to at least "prevent the presentation of frivolous evidence in pursuit of an unmeritorious appeal, and perhaps even to prevent an Appellant from splitting his case by presenting some evidence to the RPD and withholding other evidence for presentation on appeal" (*Re X*, 2014 CanLII 33085 at paragraph 10 (CA IRB) (26 March 2014) [*Re X* (33085)]). The first two *Raza* criteria align with those objectives, since evidence that is irrelevant or not credible can have no effect on the RAD's determination and should be excluded (*Act*, s 171(a.3); *Re X* (33085) at paragraphs 12-14).

[45] As for the newness criterion, *Raza* (at paragraph 13) permits the introduction of any evidence that is capable of:

> (a) proving the current state of affairs in the country of removal or an event that occurred or a circumstance that arose after the hearing in the RPD, or
>
> (b) proving a fact that was unknown to the refugee claimant at the time of the RPD hearing, or
>
> (c) contradicting a finding of fact by the RPD (including a credibility finding)?

This criterion's flaw is that it is mostly redundant (*Re X* (33085) at paragraphs 15-16). If the new evidence does not fall into any of those categories, it would not likely satisfy the express requirement of being "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" (*Act*, s 110(4)). That said the statutory language could be more lenient in rare situations where a refugee claimant withholds known facts because he or she is under duress or for other good reasons (e.g. where a victim of domestic abuse originally filed a claim jointly with his or her spouse).

[46] The most significant problem with applying *Raza* to subsection 110(4), however, is the materiality condition, which asks whether "the refugee claim probably would have succeeded if the evidence had been made available to the RPD?" (*Raza* at paragraph 13 (emphasis added)). The RAD member in *Re X* (33085) (at paragraph 21) persuasively argues that such a "restrictive approach to materiality is not consistent with the broad powers given to the RAD." Thus, I am sensitive to Justice Gagné's concerns that "the approach taken to applying admissibility criteria - either strictly or leniently - is of paramount importance because when a claimant, who is deserving of a hearing, is refused one, serious issues of procedural equity are potentially implicated" (*Singh* at paragraph 53). Indeed, it is difficult to reconcile such a restrictive materiality condition even with paragraph 113(a)'s "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" (*Raza* at paragraph 13 (emphasis added)).

[47] Nevertheless, in my view subsection 110(4) can reasonably sustain the interpretation given to it by the RAD in this case. After all, even if the evidence is admitted pursuant to subsection 110(4), it still must satisfy the following three criteria before a hearing could be held:

110. … (6) The Refugee Appeal Division may hold a hearing if, in its opinion, there is documentary evidence referred to in subsection (3)	**110.** … (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.

(Emphasis added)

Paragraphs 110(6)(b) and (c) substantially reflect the materiality requirement from *Raza*. Thus, whatever procedural inequity might flow from the inability to access a hearing will flow whether subsection 110(4) is interpreted restrictively or not.

[48] Accordingly, the RAD's reliance on *Raza* is reasonable because it is consistent with at least one plausible interpretation of the scope of an appeal to the RAD and with many well-established canons of statutory interpretation. Subsection 110(4) is ambiguous, and it is the RAD, "first and foremost, that has the discretion to resolve a statutory uncertainty by adopting any interpretation that the statutory language can reasonably bear" (*McLean* at paragraph 40; *Act*, s 162(1)).

[49] It is worth noting that, even before *Singh* was decided, some members of the RAD were questioning other members' reliance on *Raza* (see e.g. *Re X* (33085) at paragraphs 11-33; *Re X*, 2014 CanLII 66654 (24 September 2014) at paragraph 27). The RAD had the power to assign a panel of three to decide the issue once and for all if the disagreement persisted (*Act*, ss 163 and 171(c)). In situations like this, the reasonableness standard demands that "reviewing courts should lay off and give the tribunal the opportunity to work out its jurisprudence" (*Wilson* at paragraph 53).

[50] Nevertheless, the doctrine of judicial comity suggests that the Court's decision in *Singh* should be followed (*Alyafi* at paragraphs 43-45). *Singh* has been followed or approved at least five times (*Ching* at paragraphs 55-58; *Ngandu v Canada (Citizenship and Immigration)*, 2015 FC 423 at paragraphs 14-22; *Geldon v Canada (Citizenship and Immigration)*, 2015 FC 374 at paragraphs 16-21; *Sow v Canada (Citizenship and Immigration)*, 2015 FC 295 at paragraphs 15-16; *Khachatourian v Canada (Citizenship and Immigration)*, 2015 FC 182 at paragraphs 37-38). In contrast, Justice Shore's comments were *obiter* in *Iyamuremye*, and the issue was not really dealt with at length in *Ghannadi*. *Denbel* is the only recent case that has squarely departed from *Singh*. Also, this issue will soon be resolved by the Federal Court of Appeal, since the appeal from *Singh* is now scheduled to be heard later this year.

[51] In any event, the RAD's reliance on *Raza* in this case does not make much difference. The RAD rightly observed that the police report from Albania was irrelevant to the article 1E issue and could not have affected its decision even if admitted as new evidence. As for the translated *carta di soggiorno*, the only important parts of that document which were not

translated when submitted to the RPD were the stamps, one indicating the expiry date of January 12, 2016, and the other saying that renewal would be necessary in 10 years. The interpreter had already translated the latter fact for the RPD at the hearing. As for the former, the RAD made findings (at paragraphs 55, 63 and 64) which imply that it accepted that the *carta di soggiorno* may need to be renewed in 2016, even though it did not admit the document into evidence. Therefore, this evidence would not have affected the outcome.

[52] Finally, the RAD rejected the articles about Italian work permits because they were either undated or pre-dated the rejection of the Applicant's refugee claim, and were otherwise immaterial since they described the process for applying for a long-term residence permit in Italy and not the requirements for renewing that status. Even assuming it was inappropriate to consider materiality, these articles could never have met the legislated criteria since the Applicant had no reasonable excuse for not presenting the information earlier. He said in his submissions to the RAD that he "did not anticipate that exclusion would play a major role in his claim," but that appears exceptionally unlikely because the RPD hearing was specifically adjourned for two months since there was a concern about whether the Applicant was excluded by article 1E. The Applicant was permitted to file new evidence at that time and he did. He therefore had ample opportunity to collect and present these articles.

[53] Accordingly, there is no reason to set aside the RAD's decision on this ground.

E. *Was the RAD's determination that the Applicant was excluded by Article 1E reasonable?*

[54] The Applicant argues that the RAD's decision that he was excluded under Article 1E was unreasonable. According to the Applicant, the RAD never took into account evidence that the EC long-term residence permit, which has replaced the *carta di soggiorno*, can be revoked when someone no longer meets the requirements of the permit. The Applicant further states that the RAD ignored the evidence about high unemployment in Italy, and never noticed his testimony from the second hearing where he said that the *carta di soggiorno* did not entitle him to social assistance or permit him to study. As this evidence was central to the issues, the Applicant asks the Court to infer that it was overlooked (citing *Cepeda-Gutierrez v Canada (Minister of Citizenship and Immigration)* (1998), 157 FTR 35 at paragraph 17 (TD)).

[55] The Respondent submits that the RAD made no error since it examined the full record and was satisfied that the RPD did not ignore any evidence. Article 1E is about preventing asylum shopping, and the Respondent points out that refugee claims "were never meant to allow a claimant to seek out better protection than that from which he or she benefits already" (citing *Canada (AG) v Ward*, [1993] 2 SCR 689 at 726, 103 DLR (4th) 1). In the Respondent's view, the RAD reasonably concluded that the Applicant had status in Italy at all relevant times. There was no evidence to indicate that his status could not be renewed, and the Respondent defends the RAD's reasons for distinguishing *Shamlou*.

[56] I disagree with the Applicant that the RAD overlooked any material evidence. I agree with the Respondent that the RAD examined the full record and was satisfied that the RPD did

not ignore any evidence. In this case, the RAD reasonably concluded that the Applicant had status in Italy at all relevant times. There was no evidence before the RAD to indicate that such status could not be renewed in 2016 or that the Applicant's current status had been lost, either at the time of the RPD hearing or, for that matter, at the time when the RAD rendered its decision.

[57] In view of the evidence as assessed by the RAD, it reasonably and independently affirmed that the RPD had correctly applied the test in *Zeng* where the Federal Court of Appeal stated:

> [28] Considering all relevant factors to the date of the hearing, does the claimant have status, substantially similar to that of its nationals, in the third country? If the answer is yes, the claimant is excluded. If the answer is no, the next question is whether the claimant previously had such status and lost it, or had access to such status and failed to acquire it. If the answer is no, the claimant is not excluded under Article 1E. If the answer is yes, the RPD must consider and balance various factors. These include, but are not limited to, the reason for the loss of status (voluntary or involuntary), whether the claimant could return to the third country, the risk the claimant would face in the home country, Canada's international obligations, and any other relevant facts.

[58] Accordingly, there is no need for the Court's intervention since the RAD's decision with respect to this issue is justifiable and transparent, and within the "range of possible, acceptable outcomes which are defensible in respect of the facts and law" (*Dunsmuir* at paragraph 47).

V. Conclusion

[59] In the result, therefore, the Applicant's' application for judicial review is dismissed. No question of general importance is certified.

JUDGMENT

THIS COURT'S JUDGMENT is that the application for judicial review is dismissed, and that there is no question of general importance for certification.

"Keith M. Boswell"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-2798-14
STYLE OF CAUSE:	MEVLAN TOTA v THE MINISTER OF CITIZENSHIP AND IMMIGRATION
PLACE OF HEARING:	TORONTO, ONTARIO
DATE OF HEARING:	APRIL 27, 2015
JUDGMENT AND REASONS:	BOSWELL J.
DATED:	JULY 21, 2015

APPEARANCES:

Christina M. Gural	FOR THE APPLICANT
Neeta Logsetty	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Christina M. Gural Barrister and Solicitor Toronto, Ontario	FOR THE APPLICANT
William F. Pentney Deputy Attorney General of Canada Toronto, Ontario	FOR THE RESPONDENT