Federal Court  Cour fédérale

Date: 20150813

Docket: IMM-6839-14

Citation: 2015 FC 967

Ottawa, Ontario, August 13, 2015

PRESENT: The Honourable Madam Justice Strickland

BETWEEN:

DILSHOD ISMAILOV

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

[1] The Applicant, Dilshod Ismailov, has applied for judicial review of a decision of the Refugee Appeal Division of the Immigration and Refugee Board of Canada (RAD), dated September 17, 2014, in which the RAD confirmed the decision of the Refugee Protection Division (RPD) finding that the Applicant is neither a Convention refugee nor a person in need of protection (Decision). The application is brought pursuant to s 72(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA].

Background

[2] The following background is based on the Applicant's affidavit made in support of his application for judicial review, his Basis of Claim (BOC) and an amendment to the narrative contained in his BOC.

[3] The Applicant is a 30-year-old citizen of Uzbekistan. In September 2006, he began working as the Chief Accountant for a newly established construction company which was part of the Parvina Corporation (Parvina), six months later he was promoted to the Deputy Director of Finance and Commerce. His boss at the company was Mr. Absurashid Abdusalyamov. In May 2007, the company received a target loan from the Parvina-Bank in the amount of three billion Uzbek soms to buy fifty new trucks to be used for construction projects.

[4] In November 2007, Mr. Abdusalyamov called an emergency meeting with the deputy directors of companies belonging to Parvina. He told them that Parvina was subject to a serious investigation and they should leave the country as soon as possible. When the Applicant informed Mr. Abdusalyamov that he did not have any money to leave the country, he was given USD$2000. He quit his job that day and the next day left for Moscow.

[5] The Applicant spent the next two years in Moscow. When he called home, his father told him that law enforcement agencies were looking for him and it was not safe to return. In November 2009, the Applicant's father told him that he had gone to the prosecutor's office on the Applicant's behalf and explained that his son was an innocent bystander of the company. His

father also gave the prosecutor USD$5000, after which the law enforcement agencies stopped bothering the Applicant's family.

[6] The Applicant returned to Uzbekistan in January 2010 but, because he still felt unsafe, he renewed his passport and applied for an exit permit which he received later that month. In April 2012, the Applicant heard rumours that Mr. Abdusalyamov had been caught in Kazakhstan and that Uzbekistan had requested his extradition. This news worried the Applicant, so he renewed his exit permit, which he received in July, 2012.

[7] In January 2013, the case against Parvina was reopened and the Applicant was called in for a meeting with the prosecutor's office. An interrogation officer questioned him about his and Mr. Abdusalyamov's roles at Parvina. The Applicant was told to return the next day, and when he did, he was questioned about the 3 billion Uzbeki soms bank loan from Parvina-Bank that was used to purchase the trucks. When asked if he knew that the loan was a financial fraud, the Applicant explained that, to his knowledge, the loan was obtained pursuant to a valid contract.

[8] After informing the Applicant that he should return the 3 billion Uzbeki soms or face 18 years in prison for his involvement with the company, the officer offered the Applicant a deal if he testified against Mr. Abdusalyamov in a manner to be stipulated by the officer. The Applicant was asked to return the next morning. At that meeting the Applicant told the officer that he would not testify against his former boss because he had not done anything illegal and the loan was legitimate. The officer was unhappy with this response and told the Applicant it would be easy to charge and detain him, given his former position within the company and that many

officers from other Parvina companies, who had held high positions like his, had already been sentenced to 10 to 18 years of imprisonment. The officer told the Applicant to return the next day and allowed him to leave. However, the Applicant never went back.

[9] Following this meeting, the Applicant started looking for ways to leave Uzbekistan. He eventually secured a visitor visa from the Canadian Embassy in Moscow and left Uzbekistan on March 10, 2013. On the same day that he arrived in Canada, he met with a lawyer who advised him that he could apply for protection, which he did. He claims that he requires protection due to his fear of torture and cruel and unusual punishment by the prosecutor's office in Uzbekistan for his refusal to cooperate in their investigation against his former boss.

[10] The Applicant's claim was heard by the RPD on November 19, 2013. The RPD found the Applicant's story not to be credible and rendered a negative decision at the hearing. In January 2014, the Applicant appealed the RPD's decision to the RAD, which allowed his appeal in a decision dated April 16, 2014. On May 1, 2014, the Minister filed an application for judicial review of the RAD's decision, and then subsequently brought a motion for an order granting the application. On June 3, 2014, Justice Heneghan granted the order, on consent, and the matter was remitted back to the RAD for redetermination.

[11] On September 17, 2014, the RAD issued its decision in the redetermination, dismissing the Applicant's appeal and confirming the decision of the RPD. The Applicant subsequently filed the present application for leave and judicial review of the RAD's decision in that regard.

The RPD Decision

[12] The RPD decision was delivered orally on November 19, 2013. The RPD found that there was no nexus between the Applicant's claim and any of the five Convention refugee grounds. It rejected the suggestion of a possible imputed political opinion because the Applicant's fear was not based on political opinion but arose due to his former association with Parvina. As such, the Applicant's claim was only assessed pursuant to s 97 of the IRPA.

[13] The RPD found that the determinative issue was the Applicant's credibility which it assessed, drawing a number of negative inferences.

[14] The RPD noted that the Applicant testified that the police had visited his parents' home in Uzbekistan after he left the country in March 2013. However, the Applicant did not mention these police visits in his BOC narrative and the RPD found that his explanation for omitting this information, being that he was afraid that the information might get back to his home, was unreasonable given the level of detail already contained in his BOC. It drew a negative inference from this.

[15] The RPD also drew a negative inference from the fact that the Applicant could not provide any details about these police visits. The Applicant testified that he never discussed them with his parents because it was difficult for them to discuss his current situation. However, the RPD found this explanation to be implausible and, on the balance of probabilities, that the

police did not visit his parents' home after the Applicant arrived in Canada. This was a central issue of his claim as it spoke to the question of his fear of arrest should he return to Uzbekistan.

[16] Based on the Applicant's inability to recall details about his visits to the prosecutor's office in January 2013, including the exact dates these meetings took place, the RPD drew a third negative inference. The RPD found the Applicant's lack of memory on this issue to be especially troubling since the Applicant had provided very specific details in his BOC narrative. While the Applicant explained that he could not recall the details because he was nervous, the RPD did not accept this explanation. The RPD found it reasonable that the Applicant would be better able to recall the specific details of his claim since he had provided a great amount of detail in his BOC narrative and because the meetings were the very reason he decided to flee.

[17] The RPD also drew a negative inference because the Applicant testified that, after his third meeting, the prosecutor told him to return the next week, however, in his BOC narrative he wrote that he was instructed to return the next day.

[18] Finally, the RPD noted that the Applicant was unable to provide a reasonable explanation for why the authorities would let him travel freely in and out of Uzbekistan after his last meeting with the prosecutor. The Applicant testified that he was able to travel because there were no pending criminal charges against him and the investigation was "huge" and he was not the only person being investigated. However, the RPD found that if this was a hugely important investigation and the Applicant failed to appear after the third visit as requested, the authorities in Uzbekistan would not have allowed him to leave freely.

[19] For all these reasons, the RPD concluded that the Applicant was not interviewed and was not being sought by the prosecutor's office in Uzbekistan in 2013.

[20] Further, the RPD found that if the Applicant was at risk of being arrested as a result of the circumstances that he had described, and fifty-nine other employees had been arrested since 2008, then the authorities in Uzbekistan would have taken some action between 2010 and 2013.

[21] As a result, the Applicant's claim was rejected.

Decision Under Review - The RAD Decision

[22] Before the RAD, the Applicant submitted new evidence, which consisted of eleven news articles. The RAD considered whether this evidence was admissible pursuant to s 110(4) of the IRPA. It found that if the statutory conditions of s 110(4) were met, then the factors set out by the Federal Court of Appeal in *Raza v Canada (Citizenship and Immigration)*, 2007 FCA 385 [*Raza*] had to be considered in assessing the admissibility of the new evidence.

[23] The RAD concluded that the majority of the articles did not meet the statutory requirements as they pre-dated November 19, 2013, the date on which the Applicant's claim was rejected, and could reasonably have been available prior to that date.

[24] With regard to the three articles that did meet the statutory requirements, the RAD went on to assess this new evidence according to the *Raza* factors, being newness, credibility, relevance and materiality, to determine whether it should be admitted. The RAD concluded that

none of the new evidence was admissible. It then considered its role in reviewing the RPD's decision and concluded that it was required to conduct an independent assessment of the evidence, as explained by Justice Phelan in *Huruglica v Canada (Citizenship and Immigration)*, 2014 FC 799 at paras 54-55).

[25] In that regard, the RAD first considered whether the RPD erred in law by adopting a narrow interpretation of political opinion. On this question, the RAD found that even if the RPD had found there to be a nexus between the Applicant's fear as a consequence of his former involvement with Parvina, and a political or imputed political opinion, the outcome would have been the same given the RPD's findings with respect to credibility.

[26] The RAD next addressed the RPD's credibility assessment. With regard to the Applicant's testimony surrounding the police visits to his home after he fled Uzbekistan and his failure to mention these in his BOC, the Applicant argued before the RAD that he did not discuss the details of these visits with his parents over the phone because wiretapping in Uzbekistan is common. However, the RAD noted that it had reviewed the audio recording of the hearing, during which the Applicant testified that his parents did not wish to discuss this matter and had not said anything about wiretapping. As a result, the RAD concluded that the RPD committed no error in arriving at its conclusion. Further, that it would have been reasonable for the Applicant to have included information about these visits in his BOC narrative, as this indicated a continuing intention on the part of the perpetrator. Thus, the RPD properly assessed the evidence in concluding that the police visits did not actually occur. However, the RAD also

found that the RPD erred in arriving at an implausibility finding based on the fact that the Applicant had not discussed the visits with his parents.

[27] With regard to the Applicant's failure to recall the exact dates of his meetings with the prosecutor, the Applicant submitted before the RAD that these findings should not be held against him. However, the RAD disagreed, noting that this information formed a significant aspect of the Applicant's claim in that he feared the prosecutor's actions against him which allegedly led to his departure from Uzbekistan. Having listened to the audio recording, the RAD noted that the RPD indicated on the record that the Applicant had no difficulty in recalling other dates, yet he had difficulty recalling the very issues that led to his departure.

[28] The RAD also found that the RPD properly assessed the Applicant's evidence regarding the prosecutor's final instructions. The RAD found that the Applicant contradicted himself at the hearing because he initially testified that, after the third visit, the prosecutor told the Applicant he would call him if needed. However, in his BOC he stated that he was told to return the next day.

[29] In light of these findings, the RAD concurred with the RPD's finding that the Applicant's evidence about being pursued by the prosecutor was not credible, particularly since he was unable to recall the details of the events that caused him to flee from Uzbekistan which went to the heart of his claim. Finally, the RAD agreed with the RPD's finding that the Applicant's exit from Uzbekistan, under the alleged circumstances, was lacking in credibility.

[30] Before the RAD, the Applicant also argued that the RPD failed to consider his risk as a high-ranking employee of a company under investigation in Uzbekistan and to consider documentary evidence in that regard. The RAD concluded that since the RPD made significant negative credibility findings, it was not necessary for it to consider this risk, as its final conclusion was that the Applicant was not being sought by the prosecutor's office, and therefore, he did not face any risk upon return. The RAD acknowledged that the RPD accepted a number of facts related to the Applicant's employment at Parvina and the scandal involving that company, however, it noted that his risk on return, the sequence of events leading to his departure, as well as what has allegedly transpired since his departure, had been called into question.

[31] Before the RAD, Applicant's counsel also submitted a decision of the European Court of Human Rights (ECHR) to support his argument that a person should not be returned to Uzbekistan if there is a risk of interrogation. However, the RAD found that it is not bound by international jurisprudence and thus it was not necessary for it to consider that decision. In addition, since it had found the Applicant was not being pursued, the issue of interrogation upon his return was not material. In support of this finding, the RAD found that the RPD had correctly noted that other individuals in the same position as the Applicant were imprisoned in 2008, and yet, the authorities had not taken any action against the Applicant between 2010 and 2013.

[32] For all these reasons, the RAD concluded that the RPD's conclusions were based on the material aspects of the claim, and given the evidence that was before the RPD, the RAD would have arrived at the same conclusion.

Issues

[33] In my view, the issues are as follows:

1. Did the RAD err in rejecting the new evidence filed by the Applicant?
2. Did the RAD err by not conducting an independent assessment under s 97 of the IRPA?
3. Did the RAD err in its assessment of the Applicant's credibility?

Standard of Review

[34] The RAD's assessment of the new evidence involves both its interpretation of s 110(4), including whether the factors from *Raza* should apply, and its application of that provision to the facts in the present case. I agree with Justice Gagné's reasoning in *Singh v Canada (Citizenship and Immigration)*, 2014 FC 1022 [*Singh*], that the RAD's interpretation of s 110(4) is neither a question of law that is of general importance to the legal system as a whole, nor a matter that is outside the expertise of the RAD. As a result, the reasonableness standard of review should apply to both its interpretation and application of s 110(4) (*Singh* at paras 41-42). Therefore, the reasonableness standard applies to the first issue.

[35] As to the second and third issues, the RAD's decision not to conduct a review of the objective documentary evidence related to the Applicant's s 97 claim is a question of mixed fact and law (*Acosta v Minister of Citizenship and Immigration*, 2009 FC 213 at paras 9-11; *Prophète v Canada (Citizenship and Immigration)*, 2009 FCA 31 at para 7). The RAD's assessment of the evidence related to the Applicant's credibility and its resulting findings are questions of fact that are subject to deference. Both of these issues are reviewable on the reasonableness standard

(*Dunsmuir v New Brunswick*, 2008 SCC 9 at para 53). Given the disposition of this matter, as set out in reasons below, it is not necessary in this case to address the role of the RAD in reviewing the RPD's decision.

Legislation

[36] The relevant provision of the IRPA is s 110(4), which reads as follows:

110. (1) Subject to subsections (1.1) and (2), a person or the Minister may appeal, in accordance with the rules of the Board, on a question of law, of fact or of mixed law and fact, to the Refugee Appeal Division against a decision of the Refugee Protection Division to allow or reject the person's claim for refugee protection.	110. (1) Sous réserve des paragraphes (1.1) et (2), la personne en cause et le ministre peuvent, conformément aux règles de la Commission, porter en appel — relativement à une question de droit, de fait ou mixte — auprès de la Section d'appel des réfugiés la décision de la Section de la protection des réfugiés accordant ou rejetant la demande d'asile.
…	…
(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.

[37] The relevant provision of the *Refugee Appeal Division Rules*, SOR/2012-257 [RAD Rules] reads as follows:

29. (1) A person who is the subject of an appeal who does not provide a document or written submissions with the appellant's record, respondent's record or reply record must not use the document or provide the written submissions in the appeal unless allowed to do so by the Division.

(2) If a person who is the subject of an appeal wants to use a document or provide written submissions that were not previously provided, the person must make an application to the Division in accordance with rule 37.

(3) The person who is the subject of the appeal must include in an application to use a document that was not previously provided an explanation of how the document meets the requirements of subsection 110(4) of the Act and how that evidence relates to the person, unless the document is being presented in response to evidence presented by the Minister.

(4) In deciding whether to allow an application, the Division must consider any relevant factors, including

(a) the document's relevance and probative value;

(b) any new evidence the document brings to the appeal;

29. (1) La personne en cause qui ne transmet pas un document ou des observations écrites avec le dossier de l'appelant, le dossier de l'intimé ou le dossier de réplique ne peut utiliser ce document ou transmettre ces observations écrites dans l'appel à moins d'une autorisation de la Section.

(2) Si la personne en cause veut utiliser un document ou transmettre des observations écrites qui n'ont pas été transmis au préalable, elle en fait la demande à la Section conformément à la règle 37.

(3) La personne en cause inclut dans la demande pour utiliser un document qui n'avait pas été transmis au préalable une explication des raisons pour lesquelles le document est conforme aux exigences du paragraphe 110(4) de la Loi et des raisons pour lesquelles cette preuve est liée à la personne, à moins que le document ne soit présenté en réponse à un élément de preuve présenté par le ministre.

(4) Pour décider si elle accueille ou non la demande, la Section prend en considération tout élément pertinent, notamment :

a) la pertinence et la valeur probante du document;

b) toute nouvelle preuve que le

and	document apporte à l'appel;
(c) whether the person who is the subject of the appeal, with reasonable effort, could have provided the document or written submissions with the appellant's record, respondent's record or reply record.	c) la possibilité qu'aurait eue la personne en cause, en faisant des efforts raisonnables, de transmettre le document ou les observations écrites avec le dossier de l'appelant, le dossier de l'intimé ou le dossier de réplique.

Submissions and Analysis

Issue 1: Did the RAD err in rejecting the new evidence filed by the Applicant?

Applicant's Submissions

[38] The Applicant submits that the new evidence is relevant and material in the sense that it would have changed the outcome of the RPD's decision. Further, the new evidence that was published after the rejection of the Applicant's claim was not reasonably available to be presented to the RPD. As to the evidence that pre-dated the RPD hearing, these articles were submitted in response to the RPD's credibility findings and, therefore, the Applicant could not reasonably have been expected to provide them to the RPD.

[39] Finally, the Applicant submits that the RAD made a reviewable error when it failed to consider the decision from the ECHR that spoke to the existing risk for individuals with the Applicant's profile in Uzbekistan. The RAD had an obligation to review and assess this decision in accordance with s 110(4) of the IRPA.

Respondent's Submissions

[40] The Respondent submits that the RAD reasonably excluded the new evidence that post-dated the Applicant's claim by relying on the factors set out in *Raza*. This is because the RPD generally retains the privileged role of assessing the entirety of the evidence presented by a refugee claimant. Secondly, in conducting such assessments, the *Raza* factors of newness, credibility, relevance and materiality are broadly applicable to the assessment of evidence and the universality of those principles is not undermined by the fact that they have been applied in another decision-making context. Third, the RAD is largely limited to conducting a paper-based review of the RPD's decision and is not intended to be a forum that provides claimants with a second chance to correct or add to a defective evidentiary record that was before the RPD.

[41] The Respondent acknowledges that in *Singh*, Justice Gagné held that the RAD unreasonably applied *Raza* in its interpretation of s 110(4). However, the Respondent submits that *Singh* can be distinguished because, in that case, Justice Gagné accepted the applicant's assertion that he mistakenly believed the new evidence had been sent to the RPD, and thus she found that the RAD unreasonably concluded that the applicant should have brought that evidence before the RPD. By contrast, in the present case, the Applicant was unable to reasonably explain his failure to provide the RPD with the documents that pre-dated his hearing.

[42] In the alternative, and regardless of the fact that the RAD applied the *Raza* factors, the Respondent submits that the outcome of the RAD's assessment of the new evidence was reasonable. The eight documents that pre-date the rejection of the Applicant's claim were

properly excluded by the RAD because they were reasonably available prior to the rejection of the Applicant's claim, and thus did not meet the statutory requirements of s 110(4) as the RAD found at paragraph 10 of its decision. The Applicant's submission that they were submitted in response to the RPD's credibility findings is not sufficient to dispense with the statutory requirement that the Applicant "could not reasonably have been expected" to present these documents at the time the RPD rejected his claim.

[43] Further, the evidence that post-dates the rejection of the Applicant's claim would not have changed the outcome of the Applicant's claim if it had been admitted into evidence. The RAD's assessment of each item demonstrates how each failed to corroborate the Applicant's allegations of risk. The RAD reasonably rejected the first article because it pertained to the identity of the Applicant's boss which was not relevant to the RAD's assessment of the RDP's adverse credibility. The RAD reasonably rejected the second and third articles because they failed to meet the credibility criterion. This finding was reasonably open to the RAD to make.

[44] Finally, the Respondent submits that the RAD was entitled to reject the decision of the ECHR as it is not binding in the Canadian context (*Abdulla Farah v Canada (Citizenship and Immigration)*, 2012 FC 1149 at para 19 [*Farah*]; *Ince v Canada (Citizenship and Immigration)*, 2014 FC 249 at para 11).

Analysis

(a) *Articles that pre-date the rejection of the Applicant's claim*

[45] The Applicant's claim was rejected on November 19, 2013. Eight of the eleven news articles he submitted as new evidence before the RAD were published before this date. In concluding that these articles were not admissible because they were reasonably available to the Applicant prior to the rejection of his claim, the RAD relied on a strict statutory interpretation of s 110(4) of the IRPA.

[46] The Applicant, however, argues that the articles did meet the statutory requirements, as he could not reasonably have been expected to present these articles before the RPD because they respond to the RPD's credibility concerns. The Respondent, on the other hand, submits that this explanation does not meet the test of s 110(4).

[47] Assuming for the moment that the Applicant's argument raises a reasonable explanation, and I am not at all sure that it does, it is necessary to consider whether these articles actually respond to the credibility concerns raised by the RPD, which relate generally to the Applicant's claim that he was being pursued by the prosecutor's office in Uzbekistan. In that regard and for the most part, these articles are not directly relevant to the RPD's credibility concerns as they do not speak to the specific circumstances surrounding the Applicant's claim. Rather, they relate generally to the Uzbekistani authorities' treatment of political dissidents, as well as the treatment of employees who worked for large-scale media companies that were under investigation.

[48] While these articles do confirm that the prosecutor's office has been known to engage in "informal meetings", where suspected dissidents are questioned about their activities, they do not speak specifically to the treatment of individuals involved with the Applicant's former company and the alleged scandal.

[49] Several of the articles also refer to the authorities' treatment of employees from other Uzbekistani corporations involved in tax and embezzlement scandals. For example, the article titled "*Uzdunrobita managers convicted, MTS subsidiary now owned by the government*", dated September 18, 2012, reports that employees of the company under investigation "were threatened and underwent strong psychological pressure which was aimed to get them to give self-incriminating testimony".

[50] However, once again, these articles do not speak to the scandal involving the Applicant's former company. Nor are they sufficient, in my view, to displace the RPD's specific credibility findings, which were based on the Applicant's failure to mention the police visits to his parents' home in his BOC, and his inconsistent testimony about his own alleged experience of being questioned by the prosecutor's office. In assessing the Applicant's credibility, the RPD did not necessarily take issue with the occurrence of these "informal meetings", although it ultimately concluded on the balance of probabilities that he was not interviewed or being sought by the prosecutor's office based on its credibility concerns. Rather, the RPD found the Applicant's evidence not to be credible because he was unable to recall the specific details of these meetings. The RAD reached the same conclusion.

[51] Therefore, regardless of whether the Applicant's argument raises a reasonable explanation pursuant to s 110(4) and regardless of the applicability of the *Raza* factors, these articles simply do not respond to the specific credibility concerns raised by the RPD and, therefore, they are not relevant to the outcome as credibility was determinative in the RAD's decision. Further, although the Applicant frames the documents as a response to the RPD's credibility concerns so as to offer an explanation as to why he could not reasonably have been expected to present these articles before the RPD, the articles are generally illustrative of the investigative tactics employed by the Uzbekistani prosecutor's office. Therefore, as noted by the RAD, in that regard they serve to corroborate the Applicant's claim. Accordingly, it was also reasonable for the RAD to conclude that the Applicant could reasonably have been expected to produce these articles at the hearing before the RPD.

[52] However, at least two of the articles do not fall within the above analysis. As the Applicant submits, he could not reasonably have been expected to anticipate that the RPD would question the fact that he was able to safely exit Uzbekistan despite being subject to an on-going investigation by the prosecutor's office. However, as the articles titled "*Uzbekistan: Ferghana Journalist is Being Persecuted for his Help to Artists*", and "*Special Security Services of Uzbekistan Compiling Dossiers on Independent Journalists*" both establish, individuals subject to investigation have been able, and were even permitted, to leave the country. I would also note that the article entitled "*Uzbekistan: Slander Conviction a Dangerous Assault on Artists*" may be supportive of this position.

[53] In my view, it was unreasonable for the RAD to conclude that the Applicant should have reasonably been expected to submit these articles to the RPD, as the Applicant could not have anticipated that the RPD would be suspicious about the fact that he was able to leave the country. Further, the articles directly contradict the RPD's finding in that regard and the negative credibility inference that it drew from it. In addressing the RPD's finding that, if this was a huge investigation as the Applicant submitted, and if he had not appeared at the prosecutor's office as requested, then the authorities in Uzbekistan would not have allowed him to travel freely out of the country, the RAD stated that in the absence of evidence to the contrary, the RPD's credibility finding was logical. However, the new evidence was just such evidence to the contrary.

(b) *Articles that post-date rejection of the Applicant's claim*

[54] With regard to the new evidence that post-dates the rejection of the Applicant's claim, there are two questions to consider. First, was it reasonable for the RAD to apply the *Raza* factors in assessing the admissibility of this evidence? Second, if so, did the RAD reasonably conclude that this evidence should be excluded because it was either not relevant or not credible?

[55] In *Raza*, the Federal Court of Appeal considered the interpretation of s 113(a) of the IRPA, which sets out the requirements for the admissibility of new evidence in a Pre-Removal Risk Assessment (PRRA) application. The Court concluded, at paragraph 13, that:

> […] Paragraph 113(a) asks a number of questions, some expressly and some by necessary implication, about the proposed new evidence. I summarize those questions as follows:
>
> > 1. Credibility: Is the evidence credible, considering its source and the circumstances in which it came into existence? If not, the evidence need not be considered.

2. Relevance: Is the evidence relevant to the PRRA application, in the sense that it is capable of proving or disproving a fact that is relevant to the claim for protection? If not, the evidence need not be considered.

3. Newness: Is the evidence new in the sense that it is capable of:

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

If not, the evidence need not be considered.

4. Materiality: Is the evidence material, in the sense that the refugee claim probably would have succeeded if the evidence had been made available to the RPD? If not, the evidence need not be considered.

5. Express statutory conditions:

> (a) If the evidence is capable of proving only an event that occurred or circumstances that arose prior to the RPD hearing, then has the applicant established either that the evidence was not reasonably available to him or her for presentation at the RPD hearing, or that he or she could not reasonably have been expected in the circumstances to have presented the evidence at the RPD hearing? If not, the evidence need not be considered.
>
> (b) If the evidence is capable of proving an event that occurred or circumstances that arose after the RPD hearing, then the evidence must be considered (unless it is rejected because it is not credible, not relevant, not new or not material).

[56] While s 110(4) is worded nearly identically to s 113(a), there are currently two diverging views from this Court as to whether it is appropriate to apply the *Raza* factors in the context of the RAD. First, as noted by the Respondent, in *Singh*, Justice Gagné found that the *Raza* factors are not applicable in the context of the RAD for several reasons (at paras 48-55). She notes that the RAD, unlike a PRRA officer, is a quasi-judicial administrative tribunal that is tasked with conducting "an appellate review of the correctness of the RPD's determination" (at para 51). She also notes that the purpose of the RAD was described in the Parliamentary debates as providing a "full fact-based appeal" for claimants, which in turn requires a "sufficiently flexible" approach to the admission of new evidence (at para 55).

[57] However, in *Denbel v Canda (Citizenship and Immigration)*, 2015 FC 629, Justice Mosley held that the RAD was entitled to import the *Raza* analysis into its determination of whether new evidence is admissible under s 110(4) of the IRPA (at para 40). In reaching this conclusion, he relied on *Iyamuremye v Canada (Citizenship and Immigration)*, 2014 FC 494 at para 45, where Justice Shore held that:

> Considering the dearth of case law interpreting subsection 110(4) and given the essential similarity between the provisions in question, the Court does not find it unreasonable for the RAD to have referred to the factors set out in *Raza*, above, to analyse the admissibility of fresh evidence. This case law established a legal meaning to the general application of the words "new evidence," which, in the Court's view, 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 in original]

[58] Justice Mosley also noted that Rule 29(4) of the RAD Rules expressly refers to some of the *Raza* factors.

[59] One of the questions of general importance certified in *Singh* was, considering the role of a PRRA officer and that of the RAD, does the *Raza* test for the interpretation of s 113(a) of the IRPA also apply to s 110(4)? As the Federal Court of Appeal will eventually answer that question, I am most reluctant to voice another opinion in the debate. However, to my mind, it is not unreasonable for the RAD to apply the *Raza* factors which, if necessary, could be modified to address any specific concern arising from the fact that the RAD and a PRRA officer serve different purposes. In the circumstances of this case, I do not see that such a modification is required.

[60] The RAD found that neither of the articles that post-date the rejection of the Applicant's claim, when applying the factors set out in *Raza*, met the test for newness.

[61] The first article, titled "*Popular Darakchi and Sogdiana Papers on Verge of Closure in Uzbekistan*", discusses the fact that the Applicant's former boss was wanted by the authorities in connection with his ownership of two media companies that were under investigation. In my view, the RAD reasonably concluded that this evidence was not new in the sense that it did not meet the test for relevance. The RPD did not raise any credibility issues regarding the identity of the Applicant's former boss and, therefore, this article was not "capable of proving or disproving a fact that is relevant to the claim for protection" (*Raza* at para 13).

[62] The second article, titled "*Uzbekistan: Travel Agencies Require Citizens to undertake not to Seek Political Asylum Abroad*", speaks to the fact that Uzbek citizens who wish to travel abroad are required to undertake not to seek political asylum abroad, and that if they do request asylum, they may face criminal sanctions upon return. In my view, the RAD reasonably found this evidence did not meet the credibility factor in *Raza* because its only source is an unnamed employee of an unnamed Uzbek travel agency.

[63] With regard to the third article, titled "*Reincarnation of Iron Curtain*" this was published by an online newspaper and states that based on information from reliable sources, who are not identified, community committees have started to take an interest in people who travel out of Uzbekistan. In my view, the RAD also reasonably concluded that this article did not meet the credibility factor. Moreover, the RAD reasonably found this evidence to be somewhat speculative in nature, as it appears to be written as an opinion piece, rather than as an objective piece of journalism based on a variety of sources.

[64] Accordingly, in my view, the RAD reasonably refused to admit the new evidence that post-dates the Applicant's claim. None of this evidence is "new" in the sense described by the Federal Court of Appeal at paragraph 13 of *Raza*. And, in any event, this evidence does little to support the Applicant's claim.

(c) *ECHR Decision*

[65] The Applicant also submits that the RAD erred by failing to apply the test for new evidence to the decision of the ECHR titled *FN and Others v Sweden*, No 28774/09, (2012)

(ECHR Decision), which he submitted to support his claim that he would face a risk of interrogation upon return to Uzbekistan. That decision involves a family of Uzbek nationals who were subject to deportation from Sweden. That Court found it probable that, if returned to Uzbekistan, the family would be detained and interrogated about their activities while abroad. In addition, the Court referred to previous cases where it had found that "the practice of torture of those in police custody was systemic and indiscriminate and concluded that ill-treatment of detainees remained a pervasive and enduring problem in Uzbekistan". As a result of these cases, as well as information from other international sources that showed the situation had not improved, the Court concluded that the family faced a real risk that they would be subjected to persecutory treatment upon return.

[66] The RAD declined to admit this evidence because it found that it was not bound by jurisprudence outside of Canada, and because it had found that the Applicant was not being pursued and, therefore, the issue of interrogation upon his return was not material.

[67] In my view, the fact that the RAD is not bound by jurisprudence outside of Canada is irrelevant. The Applicant did not submit this evidence for a point of law, but rather for its factual findings regarding the country conditions in Uzbekistan. In other words, this decision formed part of the new evidence that was submitted to the RAD. Thus, the RAD erred by dismissing it out of hand and refusing to determine whether the decision satisfied the test for new evidence.

[68] In addition, the fact that the RPD found the Applicant was not being pursued is also irrelevant to assessing the admissibility of this decision. The ECHR Decision speaks to the

general issue of interrogation upon return after a citizen has made an asylum claim abroad. It is not linked to the interrogation the Applicant fears as a result of his former employment, but rather it forms the basis of a *sur place* claim based on a fear of interrogation after having made a claim for protection in Canada. Accordingly, the RAD unreasonably refused to assess the admissibility of this evidence.

Issue 2: Did the RAD err by not conducting an independent assessment under s 97 of the IRPA?

[69] The Applicant submits that the RAD erred in law by finding that, if the Applicant lacked credibility, there was no need to consider risk to him in Uzbekistan. The RAD also erred by failing to conduct an independent assessment of the new evidence the Applicant submitted on appeal to support his allegations of risk.

[70] In this regard, the Applicant relies on *Sellan v Canada (Citizenship and Immigration)*, 2008 FCA 381 at para 3, in which the Federal Court of Appeal held that where the RPD makes a general finding that a claimant lacks credibility, that finding may be sufficient to dispose of the claim "unless there is independent and credible documentary evidence in the record capable of supporting a positive disposition of the claim.".

[71] The Applicant also relies on *Pathmanathan v Canada (Citizenship and Immigration)*, 2012 FC 519 at paras 52-57, where this Court accepted the RPD's finding that the claimant was "not a credible witness" but overturned the decision because the documentary evidence indicated that a person with the claimant's profile, a 37 year-old Tamil male, would be at risk in Sri Lanka.

[72] The Applicant points out that at paragraph 39 of the decision, the RAD concurred that the following facts were accepted by the RPD:

a) The Applicant was employed as Deputy Director of Finance and Commerce at Parvina;

b) In 2008 Parvina was accused of committing fraud and 59 employees were convicted;

c) The CEO of Parvina was able to flee the country;

d) The Applicant also left the country and spent 2 years hiding in Moscow;

e) The Applicant returned to Uzbekistan in 2010 as the Parvina case was closed and no charges were laid against him;

f) The Applicant's former boss and the CEO of Parvina was caught in Kazakhstan in April 2012 and deported back to Uzbekistan; and

g) Parvina case was a major scandal in Uzbekistan.

[73] Based on these accepted facts, and the fact that there was sufficient documentary evidence in the materials indicating that an individual with the Applicant's profile, a high-rank employee of a company that was currently under investigation, would be at risk in Uzbekistan, the RAD was required to make an assessment of whether the Applicant would face a risk upon return to Uzbekistan.

Analysis

[74] The success of the Applicant's argument that he fits the specific profile of a "high-rank employee of a company that was currently under investigation" depends entirely on the new evidence. As noted above in the analysis of the admissibility of the new evidence, many of the documents that speak to this issue also corroborated the Applicant's claim and, therefore, the

RAD reasonably concluded the Applicant could reasonably have been expected to produce these articles at the hearing before the RPD.

[75] While the RAD unreasonably refused to admit two articles, "*Uzbekistan: Ferghana Journalist is Being Persecuted for his Help to Artists*" and "*Special Security Services of Uzbekistan Compiling Dossiers on Independent Journalists*" because the Applicant could not reasonably have been expected to submit these articles to the RPD as he could not have anticipated that the RPD would have been suspicious about the fact that he was able to leave the country, both of those articles speak only to the circumstances of journalists. They do not support a conclusion that an individual with the profile of the Applicant, a high-ranking employee of a company that was currently under investigation, would be at risk in Uzbekistan, such that the RAD was required to make an assessment of them for that purpose.

[76] In the result, the RAD did not err because there was no admissible evidence to ground the Applicant's argument. Without evidence as to profile, the existence of the specific profile identified by the Applicant was not established, and the facts accepted by the RAD could not be compared to it to determine if the Applicant actually met that profile.

Issue 3: Did the RAD err in its assessment of the Applicant's credibility?

[77] The Applicant submits that the RAD failed to consider all of the documentary evidence before concluding that the RPD did not err in reaching its credibility findings.

[78] With regard to the RAD's findings concerning the Applicant's testimony on the alleged police visits to his home after he left for Canada, the Applicant submits that the RAD failed to assess corroborative documentary evidence that was before the RPD on this point. The RAD also failed to consider the new documentary evidence confirming that Uzbek authorities take particular interest in citizens who are abroad.

[79] With regard to the RAD's assessment of the Applicant's ability to exit Uzbekistan, the Applicant submits that the RAD completely ignored documentary evidence that specifically explains the perceived inconsistency. The Applicant submitted two articles which each explained situations where journalists were called for "informal meetings" with the prosecutor's office, but were later able to leave the country.

[80] The additional new evidence submitted by the Applicant in response to the RPD's credibility findings clearly demonstrates that the state authorities in Uzbekistan often use the technique of "informal meetings" to pressure and intimidate individuals of special interest to the state. These articles also demonstrate that such informal meetings often result in criminal convictions, while other suspects were permitted and able to flee the country at that early state of investigations.

[81] Despite bringing this evidence to the RAD's attention, the RAD nevertheless concluded, that the RPD's finding that the Applicant would not have been permitted to leave Uzbekistan if he was under investigation was logical "in the absence of evidence to the contrary". Thus, the

RAD breached procedural fairness by failing to take this highly material documentary evidence into consideration when assessing the RPD's credibility findings.

Analysis

[82] As with the Applicant's submissions regarding the RAD's failure to conduct a s 97 analysis, the Applicant's challenge to the RAD's credibility findings depends on the new evidence that the RAD found to be inadmissible. The RAD conducted a detailed, independent assessment of these findings by reviewing the audio recording of the hearing and making reference to inconsistencies in his testimony.

[83] The RAD agreed with all of the RPD's findings, except for the one implausibility finding based on the fact that the Applicant did not discuss the alleged police visits after he left Uzbekistan with his parents. The RAD provided its own reasons for each of these findings, and then compared that finding to that made by the RPD to determine whether the RPD erred.

[84] However, because I have found that the RAD erred in refusing to admit some of the new evidence, specifically the evidence regarding the ability of citizens to leave the country after they have been questioned, the RAD's credibility findings on this issue were unreasonable, as they were made without regard to relevant, corroborative evidence.

[85] In conclusion, for the reasons set out above, the application for judicial review is granted.

[86] On a final note, I have found above that the RAD did not err in applying the *Raza* factors. However, that question is before the Federal Court of Appeal by way of certified question in *Singh v Canada (Citizenship and Immigration)*, 2014 FC 1022. Presumably, the Federal Court of Appeal's analysis will also encompass whether a more flexible interpretation of s 110(4) is required. This, in turn, will address the potential admissibility of new evidence that does not meet the strict statutory requirements of s 110(4), where such evidence is sought to be submitted in response to credibility concerns identified by the RPD as the Applicant submitted in this case. Accordingly, I direct that when the RAD rehears this matter, it shall be guided by any relevant determinations of the Federal Court of Appeal in considering the admissibility of all of the new evidence. I recognize that this may require the determination of this matter to be delayed until the Federal Court of Appeal has made its decision, however, such a delay is reasonable in the circumstances.

JUDGMENT

THIS COURT'S JUDGMENT is that

1. The application for judicial review is granted. The RAD Decision is set aside and the matter is remitted for redetermination. When the RAD rehears this matter, in considering the admissibility of all of the new evidence, it shall be guided by any relevant determination of the Federal Court of Appeal arising from its decision concerning the certified question in *Singh v Canada (Citizenship and Immigration)*, 2014 FC 1022;

2. No question of general importance is proposed by the parties and none arises; and

3. There will be no order as to costs.

"Cecily Y. Strickland"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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