Federal Court  Cour fédérale

**Date: 20160108**

**Docket: IMM-2692-15**

**Citation: 2016 FC 24**

**Ottawa, Ontario, January 8, 2016**

**PRESENT: The Honourable Mr. Justice Brown**

**BETWEEN:**

**VEPHKHVIA TABATADZE**

**Applicant**

**and**

**THE MINISTER OF CITIZENSHIP AND IMMIGRATION**

**Respondent**

## JUDGMENT AND REASONS

[1] This is an application for judicial review by Vephkhvia Tabatadze [the Applicant] under subsection 72(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [*IRPA*] of a decision by the Refugee Protection Division of the Immigration and Refugee Board of Canada [RPD] dated May 4, 2015, and communicated to the Applicant on May 8, 2015. The RPD denied the Applicant's claim for refugee protection. This application must be granted for the following reasons.

[2] The Applicant is from Georgia. His claim is based on alleged actions against him made by persons who were and remain powerfully connected with the Georgian government. The Applicant's family is still in Georgia. The Applicant alleges his family is living in hiding. The RPD dismissed the Applicant's claim for refugee protection, saying the determinative issues were credibility including subjective fear, delay in leaving Georgia and applying for refugee protection in Canada, and state protection. The Applicant mistakenly appealed the decision to the RAD which did not hear it because this is a legacy case, and accordingly must be determined under pre-RAD legislation. Leave to apply for judicial review was granted on September 24, 2015.

[3] The parties agree, as do I, that the standard of review in this case is reasonableness. In *Dunsmuir v New Brunswick*, 2008 SCC 9 at para 47, the Supreme Court of Canada explained what is required of a court reviewing on the reasonableness standard of review:

> A court conducting a review for reasonableness inquires into the qualities that make a decision reasonable, referring both to the process of articulating the reasons and to outcomes. In judicial review, reasonableness is concerned mostly with the existence of justification, transparency and intelligibility within the decision-making process. But it is also concerned with whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law.

[4] While counsel canvassed a number of issues, in my view, the determinative issue is the RPD's blanket rejection of all affidavit evidence filed by the Applicant's family and relatives. The RPD gave this evidence "no weight", saying: "[d]ocuments signed by his family members are self-serving since they are from his family members who have interests in the outcome of the claimant's refugee claim in Canada and as a result, the panel gives no weight to these

documents." This Court has repeatedly criticized the outright rejection of evidence provided by relatives and family members of an applicant or claimant because such evidence is self-serving: see *Kaburia v Canada (Citizenship and Immigration)*, 2002 FCT 516 at para 25; *Ahmed v Canada (Citizenship and Immigration)*, 2004 FC 226 at para 31; *Mata Diaz v Canada (Citizenship and Immigration)*, 2010 FC 319 at para 37; *Magyar v Canada (Citizenship and Immigration)*, 2015 FC 750 at para 44; and *Cruz Ugalde v Canada (Public Safety and Emergency Preparedness)*, 2011 FC 458 at para 26, as examples. I repeat those criticisms here.

[5] This Court stated one of the underlying reasons why this approach is unreasonable in *Varon v Canada (Citizenship and Immigration)*, 2015 FC 356 at para 56:

> …If evidence can be given "little evidentiary weight" [or no weight at all in the case at bar] because a witness has a vested interest in the outcome of a hearing then no refugee claim could ever succeed because all claimants who give evidence on their own behalf have a vested interest in the outcome of the hearing. …

[6] In addition, rejection of evidence from family and friends because it is self-serving or because the witnesses are interested in the outcome, is an unprincipled approach to potentially probative and relevant evidence. To allow a tribunal to reject otherwise relevant and probative evidence in this manner creates a tool that may be used at any time in any case against any claimant. It therefore defeats a primary task of such decision-makers which is to assess and weigh the evidence before them.

[7] While such an approach to the evidence may not in every case warrant judicial review, the panel's rejection of family-sourced evidence in this case resulted in the panel's rejection of evidence that directly addressed fundamental findings by the panel, namely its conclusions

concerning subjective fear, and state protection. In other words, the rejected evidence dealt with two or three of the three or four issues on which the RPD said its decision rested. These issues relate to both sections 96 and 97 of the *IRPA* which are central to Canada's statutory and *Convention* obligations. It is not possible for me to say what the decision would have been if the RPD had reasonably considered and assessed this rejected evidence. Therefore, it is unsafe to allow this RPD decision to stand, and judicial review must be granted.

[8] In addition, I am concerned with other aspects of the decision.

[9] First, the decision appears to be partially founded on a number of material and unsupported findings which themselves warrant judicial review based on misapprehension of the evidence. As examples, the RPD said it was not plausible the claimant met a person in March 2009, in one place as stated in his revised Personal Information Form [PIF] narrative, since he was somewhere else at the time. But that was not the evidence; the evidence was not that the two met, but that there had been a call. In addition, the RPD rejected the Applicant's explanation for waiting for his agent to get visas for the rest of his family, because "he knew that his agent had failed to obtain visas for his family in the past when he travelled to the Netherlands and Germany on three occasions." This also misapprehended the evidence which was that the Applicant was in fact using a different agent. And the RPD criticized the Applicant for not seeking help from state institutions when his business was audited perhaps wrongfully; however, in the face of possible criminal extortion aided by Georgian tax authorities, the Applicant, in my view reasonably, had in fact filed a complaint with the police.

[10] Further, the RPD criticized a medical report regarding a beating the Applicant received, on the ground that while the medical report states "that he was beaten by the police but there is not (*sic*) mention about Zaza Chaia beating him and that information was given by the claimant to the hospital authorities." Mr. Chaia was one of the alleged assailants. In my view, this finding is unreasonable. This medical report is criticized because it does not name the victim's assailant(s). This is a questionable basis on which to attack a medical report. This is so because when a medical report fails to identify an assailant (as here) it is criticized for incompleteness or inconsistency with the claimant's narrative. But where a medical report does identify the causes of harm to the claimant, it is subject to attack as based on hearsay despite it being both complete and consistent. The Supreme Court of Canada criticized this latter attack in *Kanthasamy v Canada (Citizenship and Immigration)*, 2015 SCC 61 [*Kathansamy*], concerning a health care professional's report that identified a source of harm to the claimant. At para 49, the majority said: "[o]nly rarely will a mental health professional personally witness the events for which a patient seeks professional assistance. To suggest that applicants for relief […] may only file expert reports from professionals who have witnessed the facts or events underlying their findings, is unrealistic and results in the absence of significant evidence." Reports of health care professionals are of most value to the extent they contain health care-related evidence; they should not be rejected because they fail to name a claimant's assailant(s). In my view, this finding was unreasonable.

[11] I am unable to leave this decision without commenting on one additional component of the RPD's decision. Concerning the critical issue of state protection, the RPD stated: "[The Applicant] would have obtained justice if he was wrongfully charged for something he did not

commit." I was pointed to no evidence that supported this glowing plausibility finding concerning Georgia's criminal justice system. In my view, it is neither evidence-based nor grounded in rationality and/or common sense; therefore it cannot stand.

[12] I appreciate that judicial review requires looking at the decision as an organic whole. Judicial review is not a piecemeal analysis. It is not correctness review. It is not a treasure hunt for errors. The reviewing court must stand back at the end of the day and determine if the decision as a whole falls within the range of possible, acceptable outcomes which are defensible in respect of the facts and law as set out in *Dunsmuir*. In my view, for the reasons outlined above, this decision does not fall within that range. Therefore, it must be set aside and remitted for re-determination.

[13] Neither party proposed a question to certify, and none arises.

## JUDGMENT

**THIS COURT'S JUDGMENT is that** judicial review is granted, the decision of the RPD is set aside, the matter is remitted for re-determination by a differently constituted panel, no question is certified and there is no order as to costs.

"Henry S. Brown"
Judge

**FEDERAL COURT**

**SOLICITORS OF RECORD**

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| **DOCKET:** | IMM-2692-15 |
| **STYLE OF CAUSE:** | VEPHKHVIA TABATADZE v<br>THE MINISTER OF CITIZENSHIP AND IMMIGRATION |
| **PLACE OF HEARING:** | TORONTO, ONTARIO |
| **DATE OF HEARING:** | DECEMBER 15, 2015 |
| **JUDGMENT AND REASONS:** | BROWN J. |
| **DATED:** | JANUARY 8, 2016 |

**APPEARANCES:**

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| Jocelyn Espejo Clarke | FOR THE RESPONDENT |

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