Federal Court  Cour fédérale

Date: 20160530

Docket: IMM-3876-15

Citation: 2016 FC 592

Ottawa, Ontario, May 30, 2016

PRESENT: The Honourable Madam Justice Heneghan

BETWEEN:

EROL CAKIR

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

JUDGMENT AND REASONS

I. INTRODUCTION

[1] Mr. Erol Cakir (the "Applicant") seeks judicial review of the decision of the Immigration and Refugee Board, Refugee Appeal Division (the "RAD") by which the decision of the Immigration and Refugee Board, Refugee Protection Division (the "RPD"), refusing his refugee claim, was confirmed.

II. BACKGROUND

[2] The Applicant is a citizen of Turkey. He based his claim for protection, pursuant to section 96 and subsection 97(1) of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 (the "Act"), upon religion, that is his desire to convert from Islam to Christianity. He also claimed to be at risk of persecution due to his political activities, that is participation in demonstrations at Gezi Park, after which he was detained. He also claimed that he was mistreated by shipmates, while working on board a ship, due to his interest in Christianity.

[3] The RPD rejected his claims because it found that the Applicant was not credible.

[4] In presenting his appeal to the RAD, the Applicant submitted new evidence and requested an oral hearing, pursuant to subsection 110(6) of the Act, if the RAD had any concerns about his credibility.

[5] The new evidence which the Applicant sought to introduce before the RAD consisted of two newspaper articles about police action in Turkey following public demonstrations. In its decision, the RAD refers to these articles as having been published on the Internet on July 11, 2013 and July 12, 2013. The first article is entitled "Police intervene in Ankara as another machete-wielding man threatens protestors" and the second is entitled "Police strike people protesting death of 19-year-old Gezi protester in Turkey".

[6] The RAD found that neither of these articles constituted "new evidence" within the meaning of subsection 110(4) of the Act and said the following at paragraph 15:

> The Appellant's proposed new evidence does not meet the requirements of Section 110(4). It did not arise after the rejection of his claim. He has not established that it was not available for him to present to the RPD. The transcript of the RPD proceeding establishes that he could reasonably have been expected, in the circumstances, to provide these documents to the RPD in support of his refugee claim.

[7] Since the RAD did not allow the admission of the proposed new evidence, the Applicant's request for an oral hearing was refused.

[8] Subsequent to the hearing of this application for judicial review on February 3, 2016, the Federal Court of Appeal delivered its decision in *Minister of Citizenship and Immigration v. Singh*, 2016 FCA 96. Pursuant to a Direction issued on April 1, 2016, the parties were given the opportunity to comment on the application of that decision in this matter. The Applicant filed submissions on April 11, 2016. The Respondent filed submissions on April 21, 2016.

III. SUBMISSIONS

A. *Applicant's Submissions*

[9] The Applicant argues that the RAD erred by refusing to admit the two articles as evidence. He submits that the RAD failed to interpret subsection 110(4) with the "flexibility" required to ensure a fair appeal. He contends that the language of section 110(4) allows the RAD

to take into account a broad range of circumstances in deciding whether the proposed evidence is "new evidence".

[10] The Applicant submits that in the circumstances of his case, he could not reasonably have been expected to present the two articles at the time of his claim was rejected since the articles were presented in response to the RPD's interpretation of an Amnesty International report. The two articles contradicted the negative credibility finding made by the RPD because they corroborated the Applicant's testimony that the police used tear gas on demonstrators during the Gezi Park protests.

[11] In the alternative, the Applicant submits that the RAD erred because it failed to consider whether rejecting the new evidence would impact his rights protected under section 7 of the *Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982*, being Schedule B to the Canada Act, 1982 (U.K.), c. 11 (the "Charter"). He argues that the RAD must exercise its discretion under subsection 110(4) in a manner that is consistent with the Charter; see the decision in *Loyola High School v. Quebec (Attorney General)*, [2015] 1 S.C.R. 613.

[12] The Applicant submits that his section 7 rights were engaged because of the serious risks to his life and the importance of the RPD's credibility finding to the success of his claim for protection.

[13] The Applicant also argues that the RAD erred by failing to conduct its own independent assessment of the evidence, that is the evidence about the date of his conversion to Christianity.

[14] In his further submissions dated April 11, 2016, the Applicant argues that the Court of Appeal's decision in *Singh, supra* found that the RAD had discretion when applying the conditions of subsection 110(4). He relies upon the Court of Appeal's determination that the new evidence does not need to be determinative of the appeal; see *Singh, supra* at paragraph 47.

[15] The Applicant acknowledges that his argument, that the RAD had an obligation to consider his section 7 rights when deciding whether to accept his new evidence, was apparently rejected in *Singh, supra*. However, he notes that the constitutionality of subsection 110(4) was not challenged in that case and submits that the decision of the Federal Court of Appeal in *Singh, supra* does not apply in his case.

B. *The Minister of Citizenship and Immigration's Submissions*

[16] The Minister of Citizenship and Immigration (the "Respondent") submits that the RAD's interpretation and application of section 110(4) was reasonable. He argues that the RAD considered whether the evidence could have been adduced before the RPD and reasonably concluded that it could have been.

[17] The Respondent submits that the RAD's refusal to accept the new evidence was not determinative of the Applicant's appeal since that new evidence addressed only the Applicant's credibility about one incident, that is the use of tear gas on the day he participated in the protests. He argues that the RAD reasonably made several other negative credibility findings.

[18] The Respondent also argues that while the RAD was entitled to show deference to the credibility findings of the RPD, it clearly undertook its own assessment of the evidence; see *Huruglica v. Canada (Minister of Citizenship and Immigration)*, [2014] 4 F.C.R. 811.

[19] The Respondent, in his further submissions dated April 21, 2016, says the decision in *Singh, supra* assists in the present case. He argues that subsection 110(4) must be interpreted narrowly and does not grant the RAD any discretion to admit new evidence, relying on paragraphs 35 and 63 of *Singh, supra*. He submits that the Applicant is trying to complete a deficient record, which the Court of Appeal confirmed is not permissible; see *Singh, supra* at paragraph 54.

[20] In response to the Applicant's submissions about the application of the Charter to the RAD's interpretation of subsection 110(4), the Respondent argues that the Court of Appeal rejected that argument in *Singh, supra* at paragraphs 62 and 63. He acknowledges that the decisions in *Doré v. Barreau du Québec*, [2012] 1 S.C.R. 395 and *Loyola High School, supra* provide that administrative decision makers must weigh Charter values in the exercise of their discretion.

[21] The Respondent contends that since the Federal Court of Appeal found that subsection 110(4) leaves "no room for discretion on the part of the RAD", *Doré* does not apply in the manner suggested by the Applicant; see *Singh, supra* at paragraph 35.

IV. DISCUSSION

[22] The RAD's interpretation of subsection 110(4) of the IRPA is subject to review on the reasonableness standard; see *Singh, supra* at paragraph 29.

[23] Subsection 110 (4) of the Act provides as follows:

(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.

[24] The Federal Court of Appeal has recently addressed the interpretation of subsection 110(4) of the Act in *Singh, supra*. I am bound by that interpretation. I refer to the decision of the Federal Court of Appeal in *Allergan Inc. et al. v. Canada (Minister of Health) et al.* (2012), 440 N.R. 269 at paragraph 43, "*Stare decisis* requires judges to follow binding legal precedents from higher courts."

[25] In my opinion, the RAD reasonably found that the proposed new evidence did not meet the criteria set out in subsection 110(4). The Federal Court of Appeal in *Singh, supra* said at paragraph 49 that the decision in *Raza v. Canada (Citizenship and Immigration)* (2007), 289 D.L.R. (4th) 675 (F.C.A.) applies to consideration of "new evidence":

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

[26] In *Raza, supra*, the Court of Appeal identified, at paragraph 13, the factors of credibility, relevance, newness and materiality.

[27] The scope for the introduction of new evidence before the RAD is narrow and the "basic rule" is that the RAD must proceed on the basis of the record before the RPD; see *Singh, supra* at paragraph 51.

[28] The RAD in the present case considered whether the Applicant could have been reasonably expected, in the circumstances, to provide the two articles to the RPD. In my opinion, the RAD reasonably concluded that the Applicant was aware following the first sitting of his RPD hearing that there was a lack of objective evidence to support his claim and he could have present the articles to the RPD.

[29] I disagree with the Applicant's submissions about the application of the analysis in *Doré, supra* to the RAD's interpretation of subsection 110(4). The Federal Court of Appeal, in *Singh, supra*, rejected this argument for a number of reasons. The Federal Court of Appeal found that

the RAD's decision not to admit new evidence would not engage the principles of fundamental justice or otherwise impact Charter values; see *Singh, supra* at paragraphs 57 to 61.

[30] The Court of Appeal also found that *Doré* requires an administrative decision maker to enforce Charter values only if it is exercising a statutory discretion; see *Singh, supra* at paragraph 62. The Court went on to find that subsection 110(4) does not grant any discretion to the RAD about the admission of new evidence; see *Singh, supra* at paragraph 63.

[31] The Applicant in this proceeding has not challenged the constitutionality of subsection 110(4). I note that subsection 110(4) of the Act benefits from the presumption that legislation is enacted in compliance with constitutional norms, including the rights enshrined in the Charter; see *Application under s. 83.28 of the Criminal Code (Re)*, [2004] 2 S.C.R. 248 at paragraph 35.

[32] Finally, I am not persuaded that the RAD erred in its assessment of the admissible evidence. The RAD's cumulative negative credibility findings fall within a range of possible, acceptable outcomes and are defensible in respect of the record before it.

[33] In the result, this application for judicial review is dismissed.

[34] The Applicant proposed the following questions for certification:

> When the Refugee Appeal Division considers whether the Appellant could have reasonably have been expected in the circumstances to have presented the evidence in question at the time of the rejection of his or her claim by the Refugee Protection Division, ought the Refugee Appeal Division to take into

> consideration whether the Appellant could reasonably have anticipated the Refugee Protection Division's concerns at the time of the hearing?
>
> Does the admission of new evidence under s 110(4) involve the exercise of discretion by the RAD? If so, does this discretion permit the RAD to admit evidence which does not meet the test under s 110(4) and does its admission engage a consideration of *Charter* values?

[35] The Respondent, by letter dated February 24, 2016 opposes the certification of the two questions proposed by the Applicant.

[36] The Federal Court of Appeal set out the test for certification in the decision *Zazai v. Canada (Minister of Citizenship and Immigration)* (2004), 318 N.R. 365 (F.C.A.), as "a serious question of general importance which would be dispositive of an appeal".

[37] In my opinion, the questions proposed by the Applicant do not meet the test for certification, and no question will be certified.

JUDGMENT

THIS COURT'S JUDGMENT is that this application for judicial review is dismissed, no question for certification arising.

"E. Heneghan"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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