Federal Court  Cour fédérale

**Date: 20160718**

**Docket: IMM-59-16**

**Citation: 2016 FC 812**

**Ottawa, Ontario, July 18, 2016**

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

**BETWEEN:**

**KHVICHA TSIKLAURI**

**Applicant**

**and**

**THE MINISTER OF CITIZENSHIP AND IMMIGRATION**

**Respondent**

## JUDGMENT AND REASONS

[1] The Applicant is a 26 year old citizen of both Georgia and Russia. He arrived in Canada on October 15, 2014, and shortly after his arrival, he claimed refugee protection on the basis of his political activities in Georgia and alleged persecution in Russia on the basis of his Georgian ethnicity.

[2] The Applicant's claim for protection was rejected in a decision of the Refugee Protection Division [RPD] of the Immigration and Refugee Board [IRB] dated April 27, 2015. The RPD found that the Applicant had not established either that he would face more than a mere possibility of persecution due to his ethnicity in Russia, or that it was more likely than not he would face a risk to his life if removed to Russia. The Applicant appealed the RPD's decision to the Refugee Appeal Division [RAD] of the IRB, but in a decision dated December 11, 2015, the RAD dismissed the appeal and confirmed the RPD's negative determination of the claim. The Applicant now asks this Court, pursuant to subsection 72(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27, to set aside the RAD's decision and return the matter to a different member of the RAD for redetermination.

## I. The RAD's Decision

[3] The RAD determined, on the basis of *Huruglica v Canada (Citizenship and Immigration)*, 2014 FC 799, [2014] 4 FCR 811, that it would conduct an independent assessment of the RPD's decision and, also, that it would defer to the RPD's credibility findings or other findings where the RPD had a particular advantage.

[4] Accordingly, the RAD concurred with the RPD's finding that the Applicant had a general lack of credibility. The RAD, like the RPD, found the Applicant could return to Russia as a citizen without fear of persecution. The RAD also concurred with the RPD that the primary target of "skinheads" in Russia are migrants and the Applicant is a citizen of Russia and not a migrant.

[5] The RAD found that while the Applicant may face some discrimination in Russia due to his Georgian ethnicity, he failed to rebut the RPD's finding that it did not amount to persecution. The Applicant did not point to any documented personal experiences that would cause him to fear persecution or pose a threat to his life in Russia. The RAD concurred with the RPD's finding that the Applicant is not a visible minority person from the North Caucasus since he is a Georgian, and as such he was not someone identified by the objective evidence as being a primary target of racial violence. The RAD noted that the Applicant did not provide any probative evidence of personal experiences for himself or his family to verify his allegations of persecution because of his ethnicity, and therefore found, on a balance of probabilities, that the Applicant could return to Russia without fear of persecution or risk to life.

## II. Issues and Standard of Review

[6] The Applicant raises one issue: that is, whether the RAD erred in finding that he was not a Convention refugee or a person in need of protection. In my view though, the central issue that warrants the Court's attention is whether the RAD's decision was reasonable.

[7] The Federal Court of Appeal has recently determined that the appropriate standard of review for this Court when reviewing a decision of the RAD is one of reasonableness (see: *Canada (Citizenship and Immigration) v. Huruglica*, 2016 FCA 93, at para 35, 396 DLR (4th) 527). Accordingly, the RAD's assessment of the evidence before it is entitled to deference (see: *Dunsmuir v New Brunswick*, 2008 SCC 9 at para 53, [2008] 1 SCR 190 [*Dunsmuir*]; *Yin v Canada (Citizenship and Immigration)*, 2014 FC 1209 at para 34; *Mojahed v Canada (Citizenship and Immigration)*, 2015 FC 690 at para 14).

[8] Moreover, the RAD's decision should not be disturbed so long as it is justifiable, intelligible, and transparent, and defensible in respect of the facts and the law (*Dunsmuir* at para 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 para 16, [2011] 3 SCR 708). The RAD's decision must be considered as an organic whole and the Court should not embark upon a line-by-line treasure hunt for error (*Communications, Energy and Paperworkers Union of Canada, Local 30 v Irving Pulp & Paper Ltd.*, 2013 SCC 34 at para 54, [2013] 2 SCR 458; see also *Ameni v Canada (Minister of Citizenship and Immigration)*, 2016 FC 164, at para 35).

## III. Is the RAD's Decision Reasonable?

[9] Before addressing the question of whether the RAD's decision is reasonable, it deserves note that because the RAD found the Applicant could return to Russia as a citizen without fear of persecution or risk to life, it did not, nor was it required to, assess the Applicant's fear of being returned to Georgia. As noted by the Court in *Becirevic v Canada (Citizenship and Immigration)*, 2015 FC 447:

> [11] …If a refugee claimant has the right to live in a country that can protect him or her, then Canada's obligation to provide surrogate protection is not engaged. In this regard, a claimant's burden to prove that he or she is a Convention refugee "includes a showing of well-founded fear of persecution in all countries of which the claimant is a national" (*Canada (Attorney General) v Ward*, [1993] 2 SCR 689 at 751, 103 DLR (4th) 1 (emphasis added)). This principle has also been endorsed more recently by the Federal Court of Appeal in *Canada (Citizenship and Immigration) v Williams*, 2005 FCA 126 at paras 20, 22, [2005] 3

FCR 429, and *Canada (Citizenship and Immigration) v Munderere*, 2008 FCA 84 at para 38, 291 DLR (4th) 68.

[10] Accordingly, it was reasonable for the RAD not to analyze the Applicant's fear of being returned to Georgia *provided* its assessment of the Applicant's risk in Russia was reasonable. For the reasons that follow, however, the RAD's assessment of the Applicant's risk in Russia was not reasonable, and the matter must therefore be sent back to the RAD for redetermination of the Applicant's claim.

[11] The RAD found the Applicant not to be at risk in Russia because he is not a migrant who faces a risk of being targeted by skinheads but, rather, is a citizen of Russia. Although this finding is accurate, it ignores and fails to properly and reasonably consider the Applicant's personal circumstances and the reality of the situation. The Applicant has never lived in Russia; he is Georgian. The record shows that while he speaks Russian, he does so with an accent and is not entirely fluent in the Russian language. In addition, he has features and characteristics consistent with a person from the Caucasus region, of which Georgia is a part. The RAD's reasons offer no explanation as to why skinheads or other racists would not target the Applicant as an "outsider" despite his status as a Russian citizen.

[12] The RAD's decision is not reasonably grounded on the evidence before it. Its observation that the Applicant did not provide any probative evidence of personal experiences for himself or his family to verify his allegations of persecution in Russia because of his ethnicity is unintelligible in view of the fact that he has never lived in Russia. A refugee claimant is not required to demonstrate a personal past persecution but may rely upon evidence of similarly

situated persons to demonstrate a risk of persecution (see: *Voskova v Canada (Citizenship and Immigration)*, 2011 FC 1376 at para 33, 213 ACWS (3d) 441; and *Salibian v Canada (Minister of Employment and Immigration)*, [1990] 3 FC 250, 73 DLR (4th) 551). Although the RAD found the Applicant may face discrimination in Russia, its conclusion that this discrimination did not amount to persecution was made without an adequate or reasonable explanation as to why this was so.

[13] Moreover, the Applicant stated that he feared removal to Russia due to the abuse of Georgians in Russia, and this fear is supported by the documentary evidence which was before the RAD (i.e., the USDOS report which is part of the December 2014 National Documentation Package). This evidence clearly indicates that racist violence is increasing in Russia against persons from the Caucasus region and not just the North Caucasus region. The perpetrators of this violence are not limited to skinhead groups, but also ultranationalist groups and, apparently, individuals as well. This evidence additionally notes that police and government officials have been exploiting xenophobia, targeting those from the Caucasus and Central Asia regions for political gain.

[14] It is, of course, well established that a tribunal such as the RAD is entitled to prefer some documentary evidence over other such evidence. But where it does so, it must provide an explanation for that preference; in particular, where there is evidence on the record that contradicts a finding of a decision-maker. As noted by the Federal Court of Appeal in *Cepeda-Gutierrez v. Canada (Minister of Citizenship and Immigration)*, 157 FTR 35, 1998 CanLII 8667 (FC):

> [17] …the more important the evidence that is not mentioned specifically and analyzed in the agency's reasons, the more willing a court may be to infer from the silence that the agency made an erroneous finding of fact "without regard to the evidence": *Bains v. Canada (Minister of Employment and Immigration)* (1993), 63 F.T.R. 312 (F.C.T.D.). In other words, the agency's burden of explanation increases with the relevance of the evidence in question to the disputed facts. Thus, a blanket statement that the agency has considered all the evidence will not suffice when the evidence omitted from any discussion in the reasons appears squarely to contradict the agency's finding of fact. Moreover, when the agency refers in some detail to evidence supporting its finding, but is silent on evidence pointing to the opposite conclusion, it may be easier to infer that the agency overlooked the contradictory evidence when making its finding of fact.

[15] In this case, the RAD either overlooked or unreasonably failed to consider and assess the clear documentary evidence which indicates that there is increasing racist violence in Russia against persons from the Caucasus region and not just the North Caucasus region.

## IV. Conclusion

[16] The Applicant's application for judicial review is granted. The RAD's decision is not reasonable and, therefore, it is set aside. The matter is returned to the RAD for a new determination by a different panel member in accordance with these reasons for judgment. No question of general importance is certified.

**JUDGMENT**

**THIS COURT'S JUDGMENT is that:** the application for judicial review is allowed; the matter is returned to the Refugee Appeal Division for redetermination by a different panel member in accordance with the reasons for this judgment; and no question of general importance is certified.

"Keith M. Boswell"

Judge

**FEDERAL COURT**

**SOLICITORS OF RECORD**

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| **DOCKET:** | IMM-59-16 |
| **STYLE OF CAUSE:** | KHVICHA TSIKLAURI v THE MINISTER OF CITIZENSHIP AND IMMIGRATION |
| **PLACE OF HEARING:** | TORONTO, ONTARIO |
| **DATE OF HEARING:** | JUNE 22, 2016 |
| **JUDGMENT AND REASONS:** | BOSWELL J. |
| **DATED:** | JULY 18, 2016 |

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| Alexis Singer | FOR THE RESPONDENT |

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