

Federal Court



Cour fédérale

**Date: 20170801**

**Docket: IMM-3785-16**

**Citation: 2017 FC 741**

**Ottawa, Ontario, August 1, 2017**

**PRESENT: The Honourable Madam Justice Elliott**

**BETWEEN:**

**O'NEIL MARLON HENDRICKS**

**Applicant**

**and**

**THE MINISTER OF CITIZENSHIP  
AND IMMIGRATION**

**Respondent**

**JUDGMENT AND REASONS**

I. Overview

[1] The Applicant seeks judicial review of a decision made by the Refugee Appeal Division [RAD] of the Immigration and Refugee Board of Canada, which dismissed the Applicant's appeal of a decision of the Refugee Protection Division [RPD]. The RPD found that the Applicant was neither a Convention refugee nor a person in need of protection under sections 96-97 of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA]. The

Applicant was unrepresented at the oral hearing, but his previous counsel provided written submissions on his behalf during the application for leave. I have had regard to both those earlier written submissions as well as the oral submissions at the hearing in deciding this matter.

[2] The Applicant claimed refugee protection on the basis that a rival disk jockey in Jamaica intended to murder him. The RPD found that the Applicant's testimony lacked credibility, that his fear did not have a nexus with a Convention ground under section 96 of the *IRPA*, that the evidence was insufficient to ground a risk to life under section 97 of the *IRPA*, and that the Applicant had not rebutted the presumption of state protection.

[3] On appeal, the RAD upheld the RPD's findings that the Applicant's delay in claiming refugee protection undermined his credibility, that his fear did not have a Convention nexus, that the Applicant did not have a subjective fear of persecution in Jamaica and that the Applicant did not face a risk to his life or of cruel or unusual treatment or punishment under section 97. The RAD did not address state protection.

[4] For the reasons that follow, this application is allowed and the matter will be sent back to a differently constituted panel for redetermination. It is not clear from the reasons of the RAD that the proper standard of review was applied to the decision of the RPD.

## II. Issues and Submissions

[5] The standard of review the Court applies to a RAD decision is reasonableness: *Canada (Citizenship and Immigration) v Huruglica*, 2016 FCA 93 at para 35 [*Huruglica*].

[6] The Applicant argues that the RAD applied an inappropriate standard of review to the RPD's findings, unreasonably assessed the Applicant's delay in claiming refugee status, did not engage in an appropriate section 97 analysis and violated procedural fairness by failing to put its concerns to the Applicant. The RAD, relying upon *Cortes v Canada (Citizenship and Immigration)*, 2016 FC 684 [*Cortes*], wrongly decided that it owed deference to the credibility findings of the RPD. As a result it did not conduct its own analysis with respect to the Applicant's credibility or other material facts decided by the RPD.

[7] The Respondent agrees that the RAD made an error of law when relying on *Cortes*, but argues that when the decision is read as a whole, it is clear that the RAD conducted an independent analysis and applied the correctness standard to the key findings of delay, no nexus to a convention ground and lack of sufficient evidence of risk.

### III. Analysis

[8] In my view, the RAD decision is not reasonable. The RAD indicated that the RPD decision would be considered as a whole. The RPD dealt with five issues: (1) the Applicant's nationality, (2) a section 96 nexus, (3) the application of section 97, (4) the Applicant's credibility, and (5) state protection. Relying on *Cortes*, the RAD found the issue to be, "did the RPD err in its credibility finding and if so, is the Appellant a Convention refugee or a protected person?" The RAD found that the RPD's credibility findings are owed "the highest degree of deference" and are "owed significant deference" and it would give such deference to the credibility findings by the RPD.

[9] The error in referring to *Cortes* as requiring the RAD, rather than this Court, to give significant deference to the RPD's credibility findings was made near the beginning of the decision and set the stage for later errors. For example, while the RAD did address the three main findings of the RPD, it then concluded that it would not address the "micro issues" raised by the Applicant because the Applicant's story did not have the ring of truth and the RPD provided cogent and detailed reasons for finding that the Applicant was not credible. As I understand this analysis, the RAD simply agreed with the RPD rather than review the balance of the Applicant's issues on appeal. Essentially, the RAD adopted the RPD reasons as its own. The RAD then stated it had considered all the evidence and found that the RPD provided "cogent and detailed reasons for finding that the applicant was not credible", concluding as follows:

After independently considering the totality of the evidence before me, I find that the RPD's credibility findings and section 97 analysis are supportable. I also note that the RPD's credibility finding is owed significant deference as per the Court in *Cortes*.

[10] By failing to independently analyze determinative findings made by the RPD yet stating that the RPD decision would be reviewed "as a whole", the RAD failed to perform the required correctness review. The RAD twice refers to the RPD decision as being "supportable", rather than correct. It also refers to the RPD's delay analysis as being "in-line" with *Guirguis v Canada (Minister of Citizenship and Immigration)*, 2006 FC 413. These references lead one to believe the RPD acted reasonably, not correctly.

[11] It is true that on a few occasions, such as on Convention nexus, the RAD explicitly refers to the RPD as being correct. However the RAD's section 97 analysis was clearly tainted by its misapprehension of the standard of review. The RAD's credibility assessment included

deference on findings where there was no indication by the RAD that the RPD enjoyed a meaningful advantage, such as delay. These credibility findings affected the RAD's conclusion that the story did not have the "ring of truth." While a portion of the section 97 analysis was based on an evaluation of the likelihood that the rival disk jockey was still looking for him, a question separate from credibility, the RAD also stated that "the RPD's credibility findings and section 97 analysis are supportable" [emphasis added].

[12] Given the misplaced reliance on *Cortes* and these references, which sound like a reasonableness standard, it is my view that the reasons of the RAD are not sufficiently intelligible, transparent or justified for me to conclude that the outcome was the product of the appropriate standard of review, and therefore defensible in respect of the law. The matter must be sent back to a different panel for redetermination to follow and apply the standard of review set out by the Federal Court of Appeal in *Huruglica*.

[13] Neither party posed a question for certification, nor did one arise on the facts.

**JUDGMENT IN IMM-3785-16**

**THIS COURT'S JUDGMENT is that:**

1. The application is allowed and this matter is remitted to a differently constituted panel of the Refugee Appeal Division for reconsideration, applying the standard of review found in *Huruglica*.
2. There is no question for certification.

“E. Susan Elliott”

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Judge

**FEDERAL COURT**

**SOLICITORS OF RECORD**

**DOCKET:** IMM-3785-16

**STYLE OF CAUSE:** O'NEIL MARLON HENDRICKS v THE MINISTER OF  
CITIZENSHIP AND IMMIGRATION

**PLACE OF HEARING:** TORONTO, ONTARIO

**DATE OF HEARING:** JULY 25, 2017

**JUDGMENT AND REASONS:** ELLIOTT J.

**DATED:** AUGUST 1, 2017

**APPEARANCES:**

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