Federal Court  Cour fédérale

Date: 20181211

Docket: IMM-788-18

Citation: 2018 FC 1246

[UNREVISED CERTIFIED ENGLISH TRANSLATION]

Ottawa, Ontario, December 11, 2018

PRESENT: The Honourable Mr. Justice LeBlanc

BETWEEN:

ISSAKHA HAMID HAMID

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Introduction

[1] The applicant seeks a judicial review of a decision handed down by the Refugee Appeal Division [RAD], dated January 26, 2018, dismissing his appeal of a decision by the Refugee Protection Division [RPD] under which he was denied the status of refugee or person in need of

protection, as defined in sections 96 and 97 of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [Act], because his refugee protection claim lacked credibility.

[2] This case primarily involves the standard of intervention that the RAD must use when reviewing, on appeal, the merits of the RPD's findings regarding the credibility of the refugee protection claimant. In particular, it concerns the identification of situations where the RAD may be justified in showing a deferential approach with respect to those conclusions.

[3] This issue arises in the aftermath, of course, of the case of *Canada (Citizenship and Immigration) v Huruglica*, 2016 FCA 93 [*Huruglica*], where the Federal Court of Appeal ruled, essentially, that the RAD should review findings of fact, or findings of mixed fact and law made by the RPD on a standard of correctness, while recognizing, however, that some deference may be required where such findings are based on the assessment of credibility or weight of oral evidence, taking into account the advantage that the RPD may enjoy over the RAD in such situations.

[4] It is also in the wake of a majority decision handed down on May 17, 2017, by a panel of three members of the RAD, a decision whereby the majority of members worked, following the *Huruglica* affair, to identify the circumstances where it is appropriate for the RAD to show deference with respect to the RPD's findings and to determine the degree or level of deference applicable, where appropriate (*X (Re)*, 2017 CanLII 33034 (CA IRB) [*X (Re)*]). In particular, the two majority members were of the opinion that some deference was required when the RPD's finding of negative credibility was based on the presence of contradictions, inconsistencies or

omissions in the oral testimony given by the refugee protection claimant or between that testimony and the documentary evidence filed by the claimant in support of his or her claim, two situations where, in their opinion, the RPD has a meaningful advantage over the RAD (*X (Re)* at para 50).

[5] The member who heard the applicant's appeal [the Member] found that this case called into question the same type of finding. He therefore felt obliged to show deference—and therefore to use the reasonableness standard—with respect to the RPD's findings of fact that relied on the applicant's oral testimony "about inconsistencies or contradictions relating to documents" (Member's Decision, Certified Tribunal Record, at p 11, para 33).

[6] However, the decision in *X (Re)*, which, pursuant to paragraph 171(c) of the Act, was binding upon the Member just as a decision of a court of appeal is on a first instance court (see also: *Huruglica* at para 56), was subject to judicial review in this Court (docket IMM-2645-17).

[7] When I heard this case on September 6, the Court (Mr. Justice Alan Diner) had still not rendered his decision in that case. I therefore told the parties that I would wait for Justice Diner to hand down his ruling, which was then imminent, before returning mine and that I would give them an opportunity, before doing so, to submit additional representations to me about the impact of that judgment on this file.

[8] On November 14, 2018, Judge Diner delivered his judgment (*Rozas Del Solar v Canada (Citizenship and Immigration)*, 2018 CF 1145 [*Del Solar*]. He essentially concluded that the

questions relating simply to the testimony given at the hearing cannot, in and of themselves, constitute a reason to justify the application of a deferential standard since that would be acknowledging to the RPD, which systematically hears refugee protection claimants, a general advantage over the RAD almost invariably triggering the application of such a standard. For Diner J., the exercise demanded of the RAD in such circumstances requires that it identify in which cases this general advantage becomes a "specific, meaningful" advantage, justifying the use of a deferential standard, a matter that the two majority members failed to address, thus affecting the reasonableness of their model of identifying cases where the application of such a standard is recommended (*Del Solar* at paras 105–107).

[9] With respect to the applicable degree of deference, in cases where some deference is required, Diner J. concluded that the content of the deferential standard adopted by the majority did, for all intents and purposes, duplicate the standard of reasonableness applicable to judicial review, which, in his opinion, was contrary to the directions of the Federal Court of Appeal in *Huruglica* and, more generally, the legislative objective underlying the establishment of the RAD, which is to give refugee protection claimants a genuine "full, fact-based appeal" (*Del Solar* at para 135). While aware of the challenge that this may pose, he found that it was up to the RAD to craft a specific standard of deferential control that is "consistent with and animated by the purposes of its governing legislation" (*Del Solar* at paras 131–133).

[10] In this regard, the applicant argued that the Member, in deciding, without further ado, that he had to show deference to the RPD's findings, made a reviewable error.

II. The facts giving rise to this case

[11] The applicant is of Chadian origin. He belongs to the Gorane ethnic group. In June 2017, he left Chad for the United States. A few days later, he came to the Canadian border and claimed refugee protection. The applicant claimed to be afraid of being arrested and tortured by the Chadian authorities if he were to return to that country due to an ethnic conflict that originated in an incident on November 26, 2016, when a Gorane child died during a sports competition after being hit in the head by a stone thrown by a child of a rival ethnic group, the Zakawa ethnic group. The applicant recounted that following the refusal of the police to intervene, the local Gorane community mobilized to go to the author of the tragedy's parents' house so that the parents could take him to the police, which they refused to do.

[12] The applicant went on to say that after the victim's funeral, members of the Gorane community avenged the victim by throwing stones and objects of all kinds at the author of the tragedy's parents' house. In retaliation, members of the Zakawa community allegedly opened fire on a group of Goranes, killing 4 people and wounding 15 others.

[13] Outraged, the applicant decided to mobilize the young Goranes of his region, to set up an association to support the victims of this slaughter, the *Association tchadienne de soutien des victimes de Ngueli* (Chadian Association for Support of Ngueli Victims) [Association] and to organize demonstrations aimed at denouncing the Zakawa community. He stated that the demonstrations were repressed by the police. Still according to the applicant, on February 12, 2017, he and members of his Association were arrested and placed in detention by agents of the National Security Agency, accused of wanting to join a group of Chadian insurgents living in southern Libya. While he was in detention, they reportedly sought to extract information from

him and he was allegedly tortured. Two months later, the convoy carrying him and other detainees to another detention facility was reportedly attacked by soldiers, but the applicant managed to flee and seek refuge with an uncle who subsequently assisted him in obtaining travel documents and leaving the country for the United States.

[14] The RPD did not believe the applicant's story because of a number of inconsistencies and omissions in his evidence, including his relationship to the Association, which he did not participate in creating and of which he was only a member, without duties within the executive board, and the problems that the applicant had reportedly encountered because of his membership in this group.

[15] More specifically, the RPD criticized the applicant for indicating in his application form that he had "founded" the Association whereas the evidence he submitted himself rather demonstrates that the Association was created in France, that he did not really participate in its creation and that he was at most only an "active member", and not a member of the executive as he had claimed. It believes that the applicant wanted to enhance his role in this group to embellish his refugee protection claim.

[16] As to the problems the applicant had reportedly encountered as a result of his activities with the Association, the RPD noted that the documentary evidence produced by the applicant did not support them. In particular, it considered that if the applicant had really experienced those problems, the letter written by the president of the Association for him, and which is subsequent to those events, would have mentioned them, just like another letter from the

President denouncing this time the alleged attack in April 2017 on the convoy of prisoners, which the applicant claimed to be part of, would have made mention of the latter's presence.

[17] The RPD also reproaches that the applicant offered contradictory evidence regarding the demonstrations he says he organized and that he says were repressed by the police. In fact, it says that there was only one organized demonstration, but that it did not take place since a law had just been passed banning any gathering of Goranes.

[18] The RPD was also surprised that the applicant produced a letter from his employer stating that he had been granted leave for the period from May 15, to June 30, 2017, when he had stated that he had been absent from work since February 12, 2017, the day of his arrest. It also did not believe that his employer inquired, by letter, that same month, with the applicant's mother, about his absence from work because that letter was not presented in evidence by the applicant. In view of its importance for the purposes of weighing the applicant's account, the RPD considered that if that letter had really existed, the applicant would undoubtedly have produced it.

[19] Finally, the RPD was generally dissatisfied with the answers given by the applicant to explain those contradictions, omissions and inconsistencies.

[20] As I indicated at the outset, the Member found, after having made an independent analysis of the file, that there was no need to intervene, being satisfied, in accordance with the model of analysis put in place in *X (Re)*, that the RPD's assessment of the applicant's credibility met the requirements of the standard of reasonableness.

III. Issue and standard of review

[21] The main issue in this case is whether the Member, in concluding as he did, applied the correct standard of intervention. This issue, which addresses the meaning and scope of the provisions of the Act delineating the role and powers of the RAD, is reviewable on a standard of reasonableness (*Huruglica* at para 30; *Del Solar* at para 24). Neither party to this litigation has claimed otherwise.

[22] The applicant also claims that the Member erred in failing to consider the ground of persecution based on his Gorane ethnicity. Given the answer to the first question, it will not be necessary for me to address this second ground for the applicant's application for judicial review.

IV. Analysis

[23] Had it not been for the judgment of this Court in *Del Solar*, it would have been more difficult to reverse the choice of standard of intervention used by the Member. After all, he was bound by the decision of the two majority commissioners in *X (Re)* and, therefore, both by the model to be used to identify the cases where some deference is appropriate and by the degree of deference applicable in similar circumstances suggested by those members.

[24] Since this model of identification and degree of deference was deemed unreasonable by Diner J., the applicant submitted that it is now clear that the Member did not apply the correct standard of intervention and that I should therefore set aside the decision and refer the matter back to the RAD so that he can benefit from the appeal to which he was entitled.

[25] The respondent submits, on the other hand, that Diner J.'s judgment has [TRANSLATION] "no direct impact" on the Member's decision since, whatever the applicable standard of intervention, this decision [TRANSLATION] "remains fundamentally sound". He argues that the deficiencies identified by the RPD in this case are distinguishable from those at issue in *Del Solar* because they flow not from the applicant's own testimony, as was the case in *Del Solar*, but from the applicant's documents produced in support of his claim, his testimony being, in this context, only an [TRANSLATION] "incidental aspect" of the RPD's and the Member's decision.

[26] In short, he says, the error that we could now criticize the Member for, given *Del Solar*, is not determinative of the outcome of the litigation. According to the respondent, the Member ultimately found, after an independent review of the record, that the RPD properly concluded that the applicant failed to meet the requirements of section 11 of the *Refugee Protection Division Rules*, SOR/2012-256, which requires a refugee protection claimant to provide the RPD with "acceptable documents establishing their identity and other elements of the claim" and, when the claimant cannot do so, to "explain why they did not provide the documents and what steps they took to obtain them". The applicant thus failed to satisfy his [TRANSLATION] "evidentiary burden" which, according to the Defendant, constitutes, whatever the applicable standard of intervention, a sufficient basis to justify the rejection of the refugee protection claim and the applicant's subsequent appeal to the RAD.

[27] I cannot subscribe to this point of view, which makes the Member's decision say much more than what it actually says.

[28] The Member, relying on *X (Re)*, identified in these terms what should have guided his analysis:

> [32] The RAD's role is to review RPD decisions, applying the correctness standard of review, after conducting its own analysis of the record. The exception to that rule applies in cases where the RPD enjoyed a meaningful advantage in assessing the credibility or weight to be given to the oral evidence it heard; the RAD must then apply the reasonableness standard.
>
> [33] A decision rendered by a three-member RAD panel provides examples of situations in which the RPD could have a meaningful advantage. One of these examples applies in this case, that is, where the RPD questions a claimant about inconsistencies or contradictions relating to documents and hears the explanation provided. In my opinion, that is indeed the situation in this case. Consequently, there is reason for me to show deference to the RPD's findings of fact that are based on the oral testimony it heard from the claimant regarding his own contradictions or inconsistencies relating to certain documents. Consequently, I must apply the standard of reasonableness while conducting an independent analysis of the record.
>
> [Footnote references omitted; emphasis added]

[29] There is therefore no ambiguity as to the approach taken by the Member in this case. This approach is entirely based on the decision of the majority members in *X (Re)* and is, therefore, inconsistent with the judgment of Diner J. As the Member pointed out, this whole case is about the credibility of the applicant's explanations for the omissions found by the RPD in the documents he himself put in evidence in support of his refugee protection claim. According to Diner J., the approach advocated by the two majority members is unreasonable in that it provides no guidance as to when the overall advantage enjoyed by the RPD by hearing the evidence of refugee protection claimants becomes a "specific, meaningful*"* advantage justifying, in a given case, the application of a deferential standard.

[30] This analysis, in one form or another, is absent from the Member's decision. As *Del Solar*, until proven otherwise, is now authoritative and henceforth sets the standard required from the RAD, this is, in my view, a fatal error since the Member opted to review the RPD's decision on the deferential standard of reasonableness without explaining how the RPD had, in the circumstances of this case, a distinct advantage in assessing the credibility of the applicant's explanations aside from the omissions that the RPD stated to have found in the documentary evidence that accompanied his refugee protection claim. In addition, it does not specify whether the RPD was able to support its findings with respect to the credibility of the refugee protection claim on elements of the record that were not available to the Member when he did the review of the applicant's appeal, which could have been an indication of the presence of this clear advantage (*Del Solar* at para 93).

[31] Although he did not admit the merits, the respondent did not invite me to depart from the judgment of Diner J. He was silent on the subject. In this respect, I would point out that under the doctrine of judicial comity, I must refrain from dismissing the conclusions of law drawn by another judge of the Court unless I am convinced that those conclusions are erroneous and that this error can be persuasively demonstrated (*Apotex Inc v Allergan Inc.*, 2012 FCA 308 at paras 43–48, leave to appeal to SCC refused, 35184 (May 9, 2013), *Alyafi v Canada (Citizenship and Immigration)*, 2014 CF 952 paras 42–45).

[32] Here, Diner J. essentially ruled on the law, on what constitutes a reasonable interpretation of the provisions of the Act creating the remedy before the RAD aside from the question of the

standard of intervention to which it is held when the decision under appeal rests on findings tied to the credibility of the refugee protection claim.

[33] At first glance, I do not see any reason to depart from this judgment. Diner J. worked on a thorough and rigorous analysis of the issue. To this end, he benefited from the perspective of three experts in refugee rights issues: the Canadian Association of Refugee Lawyers, the Canadian Council for Refugees, and the Association Québécoise des avocats et avocates en droit de l'immigration.

[34] In any event, the approach advocated by the two majority members in *X (Re)*, and adopted by the Member in this case, appears to me to be contrary to the directions of the Federal Court of Appeal for which the circumstances require some deference on the part of the RAD and for which the applicable degree of deference, where appropriate, must be assessed on a case-by-case basis (*Huruglica* at paras 70 and 74). In this, I share the more nuanced approach adopted by the dissenting member in *X (Re)* and formulated in paragraphs 157 and 158 of that decision:

> [157] The arguments submitted by the parties and the intervenors lead me to consider in which situations the RPD has a meaningful advantage over the RAD, as well as the extent of this advantage in assessing the credibility of testimony.
>
> [158] In current decisions of the Federal Court and the Federal Court of Appeal, it is indicated in which types of cases the RPD finds itself in an advantageous position in relation to the RAD and vice versa. For example, the Federal Court states that the RAD is as equally well‑placed as the RPD to determine plausibility. The Federal Court also finds that it is appropriate for the RAD to give deference to the RPD regarding the authenticity of a document when the RAD does not have the original documents. That being said, I am also of the opinion that there is no need for me to further discuss situations that may present themselves before the RAD as I fear that talking in generalities or establishing categories could give rise to rigidity where the RAD is concerned. As Justice

> Gauthier states, the degree of deference owed to the RPD "ought to be addressed on a case‑by‑case basis. In each case, the RAD ought to determine whether the RPD truly benefited from an advantageous position, and if so, whether the RAD can nevertheless make a final decision in respect of the refugee claim."
>
> [Footnote references omitted]

[35] Once again, this particularized inquiry seeking to characterize the advantage that the RPD may have and to define a level of deference that is specific to the reality of the RAD as a specialized appellate tribunal is lacking in this case, which taints, in my opinion, the whole analysis that the Member performed. The fact that the Member pointed out that he engaged in an independent analysis of the case does not change anything if, at the end of the day, this analysis was performed through a distorted lens. It seems clear to me that the Member focused his entire analysis through the prism of reasonableness without first being satisfied that the present case fell into one of the categories described by the majority members in *X (Re)* as capable of triggering the application of a deferential standard, if that standard suited the circumstances of the case and what form it should take.

[36] The danger, it seems, of the approach advocated in *X (Re),* if it were to be endorsed, would be to transform the rule established in *Huruglica,* that questions of fact or of mixed fact and law submitted to the RAD be reviewed by it on the standard of correctness, into an exception.

[37] I conclude that this is sufficient to allow this judicial review since the applicant did not have the appeal to which he was entitled. In the circumstances, it does not seem to me to be useful, as I have already mentioned, to decide whether the RAD failed to consider the

persecution ground based on his ethnicity and, in so doing, made an error justifying the intervention of the Court.

[38] The respondent is asking me to certify the following question, which is one of the three questions certified by Diner J. in *Del Solar*:

> Was it reasonable for the RAD to adopt a deferential standard of RAD reasonableness, under which the RPD's findings will be deferred to where the RAD can understand how they were reached, and where they were based on evidence in the record?

[39] This question will not provide a complete solution to this case since it concerns only one of the two issues raised by this appeal, the other one concerning the model of identifying situations where some deference on the part of the RAD may be in order. In any case, this issue has been thoroughly reviewed in *Del Solar* and has already been certified. I do not see the point of duplication (*Sisman v Canada (Citizenship and Immigration)*, 2015 FC 930 at para 37).

JUDGMENT in IMM-788-18

THE COURT'S JUDGMENT is that:

1. The application for judicial review is allowed;
2. The decision of the Refugee Appeal Division, dated January 26, 2018, dismissing the applicant's appeal of a decision by the Refugee Protection Division denying him refugee status or the status of a person in need of protection, is set aside and the case is referred back to another member of the Refugee Appeal Division for redetermination;
3. No question is certified.

"René LeBlanc"
Judge

Certified true translation
This 9th day of January 2019.

Johanna Kratz, Translator

FEDERAL COURT

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	IMM-788-18
SYTLE OF CAUSE:	ISSAKHA HAMID HAMID v MINISTER OF CITIZENSHIP AND IMMIGRATION
PLACE OF HEARING:	MONTRÉAL, QUÉBEC
DATE OF HEARING:	SEPTEMBER 6, 2018
JUGEMENT AND REASONS:	LEBLANC J.
DATED:	DECEMBER 11, 2018

APPEARANCES:

Stéphanie Valois	FOR THE APPLICANT
Mario Blanchard	FOR THE RESPONDENT

SOLICITORS OF THE RECORD:

Stéphanie Valois Barrister and Solicitor Montréal, Québec	FOR THE APPLICANT
Attorney General of Canada Montréal, Québec	FOR THE RESPONDENT