Federal Court  Cour fédérale

Date: 20141023

Docket: IMM-1217-14

Citation: 2014 FC 1009

Montréal, Quebec, October 23, 2014

PRESENT: The Honourable Mr. Justice Beaudry

BETWEEN:

BADRA ALY DIARRA

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

[1] This is an application for judicial review pursuant to subsection 72(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA], of a decision by the Refugee Appeal Division [RAD] dated January 23, 2014. The RAD confirmed the Refugee Protection Division's [RPD] decision dated September 25, 2013 that the Applicant was not a refugee, nor a person in need of protection.

[2] The application for judicial review shall be allowed for the following reasons.

Background

[3] The Applicant is a citizen of Mali. In 2009, he arrived in Canada on a student visa.

[4] In March 2012, following a *coup d'état* in Mali, the Applicant's family's home and his stepfather's business were ransacked by the military because of the business contracts the stepfather had with the Malian government.

[5] According to the Applicant, his stepfather, a Dutch man, sent his wife and children to the Netherlands. The stepfather remained in Mali for a few months before joining his family there.

[6] Because of his family's departure from Mali, the Applicant ceased to receive money from his stepfather including payment for his tuition fees.

[7] The Applicant sought refugee protection in July 2013.

[8] The Applicant's refugee application was heard by the RPD on September 23, 2013. It issued its decision and reasons on September 25, 2013. In essence, the RPD did not question the alleged facts following the c*oup d'état* in March 2012 but noted that general physical violence was present for a short period of time. It did not believe that the Applicant's subsequent allegations were credible. The RPD also concluded that the Applicant had failed to establish that he was a refugee or a person in need of protection pursuant to sections 96 and 97 of the IRPA.

[9] On September 24, 2013, the Applicant claims to have received a letter from his stepfather corroborating his narrative (page 40, Tribunal Record).

[10] On September 27, 2013, the Applicant forwarded this letter to the RPD. However, the letter was returned to him as the RPD had already rendered its decision.

[11] The Applicant appealed the RPD's decision and submitted his stepfather's letter as new evidence. Subsequently, the Applicant requested a hearing before the RAD pursuant to subsection 110(6) of the IRPA.

[12] The RAD rendered its decision on January 23, 2014.

[13] In its decision, the RAD noted that the admissibility of new evidence was governed by subsection 110(4) of the IRPA. It further mentioned that at the time of rendering its decision, there was no jurisprudence relating to the application of the above-mentioned subsection; therefore, it relied on the Federal Court of Appeal's interpretation of a relevant IRPA provision, that is paragraph 113(a) relating to Pre-Removal Risk Assessment [PRRA] in the case of *Raza v Canada (Citizenship and Immigration)*, 2007 FCA 385 [*Raza*]. The RAD deemed paragraph 113(a) to be similar in its wording and effect as subsection 110(4).

[14] Following the criteria set out in *Raza*, the RAD concluded that the stepfather's letter failed to meet two criteria, namely credibility and materiality. This conclusion was reached by the RAD because the letter was not addressed specifically to the tribunal, nor did it provide an

address for the stepfather. Also, the letter had not been notarized and it would not have altered the RPD's decision had it been admitted as evidence prior to the tribunal reaching its decision to reject the Applicant's application.

[15] With that conclusion, the RAD considered that there was no need for a hearing of the Applicant's appeal.

[16] The RAD then proceeded to address the question of standard of review. It noted that the RAD does not perform a judicial review of the RPD's decision. Rather, the matter before the RAD is similar to that of an appeal before a Court. However, given the absence of clear directions in the jurisprudence, the RAD applied the principles set out in *Dunsmuir v New Brunswick*, 2008 SCC 9, [2008] 1 SCR 190 [*Dunsmuir*]. It determined that given that the matter involved questions of credibility, the standard of reasonableness was applicable in the present case.

[17] The RAD proceeded to an analysis of the RPD's findings having in mind the standard of reasonableness and confirmed that the decision was reasonable.

[18] The Applicant raises numerous issues but only one is sufficient to return the matter for reconsideration which is the standard of review adopted by the RAD.

Parties positions

[19] The question of the role of the RAD in appeal of the RPD is central here. In recent months, this Court has rendered decisions offering different approaches in determining the standard by which appeals to the RAD should be determined.

[20] The first approach, which is advocated by the RAD in this case, is the use of judicial review principles using the standard of reasonableness in assessing the RPD's decision. This approach has been rejected by this Court *Alyafi c Canada (Citoyenneté et Immigration)*, 2014 CF 952 at para 39 [*Alyafi*].

[21] The second approach uses the standard of review applicable to appellate courts set out in *Housen v Nikolaisen*, 2002 SCC 33, [2002] 2 SCR 235, which is the "palpable and overriding error". Such an approach was used in *Alvarez v Canada (Citizenship and Immigration)*, 2014 FC 702 [*Alvarez*].

[22] The third approach proposed by *Huruglica v Canada (Citizenship and Immigration)*, 2014 FC 799 [*Huruglica*], advocates for a hybrid form of appeal.

[23] Initially arguing in favour of the standard of correctness, the Applicant, in light of recent decisions, submits that a hybrid form of appeal should be the approach used by the RAD in assessing appeals from the RPD.

[24] On the other hand, the Respondent argues that the RAD did not err in reviewing the RPD's credibility analysis on the reasonableness standard. In support of this position, the Respondent asks us to consider this Court's decision in *Njeukam v Canada (Citizenship and Immigration)*, 2014 FC 859, where Locke J. held that:

> [14] Except in cases where the credibility of a witness is critical or determinative or when the RPD has a particular benefit from the RAD to draw a specific conclusion, the RAD must not give any deference to the analysis of the evidence made by the RPD: see *Huruglica*, at paras 37 and 55. The RAD has as much expertise as the RPD and maybe more with respect to the analysis of the relevant documents and the representations from the parties. […]
>
> [18] The issue of standard of review is not determinative in this case because the RPD's dispositive finding concerns the applicant's credibility. Therefore, even following *Huruglica*, the RAD was right to defer to the RPD's findings.

[25] Further, the Respondent argues that following the Supreme Court of Canada's decision in *Canadian Artists' Representation v National Gallery of Canada*, 2014 SCC 42, it was reasonable for the RAD to apply the standard of reasonableness in analyzing the RPD decision.

[26] In any event, the Respondent argues that the decision should be upheld regardless of the standard of review applied by the RAD.

Analysis

[27] In *Alyafi*, Martineau J. makes it clear that by applying the judicial review standard of reasonableness, the RAD committed a reviewable error, see para 46. The RAD does not sit in judicial review of the RPD's decisions. In the present case, the RAD's panel member acknowledged this fact in the contested reasons at paragraph 35, where he stated:

> Bien que la SAR ne procède pas à un contrôle judiciaire des décisions de la SPR, mais qu'elle agisse plutôt en instance d'appel, au sein du même tribunal administratif qu'est la CISR, j'estime qu'à défaut d'indications plus directes des tribunaux supérieurs, il est possible d'appliquer à la SAR les principes développés dans l'affaire *Dunsmuir*.

[28] However, the panel member proceeded with a judicial review analysis of the RPD's decision using the standard of reasonableness as set out in *Dunsmuir*.

[29] Therefore, the RAD erred in its application of the standard of reasonableness and for that reason alone the matter should be referred back to the RAD.

[30] Further, the Court notes that the same two questions have been certified in relation to the RAD's role in considering appeals from the RPD in the cases of *Huruglica* and *Spasoja c Canada (Citoyenneté et Immigration)*, 2014 CF 913.

[31] The parties did not propose a question for certification**.** The Court on its own discretion would have certified a question of general importance on the issue of determination to be applied by the RAD from appeals from the RPD. This question has been raised in the above two cases. Therefore, the Court shall not certify a question on the same issue.

JUDGMENT

THIS COURT'S JUDGMENT is that the application for judicial review be allowed, the matter is remitted back for reconsideration by a newly constituted RAD. No question is certified.

"Michel Beaudry"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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