Federal Court  Cour fédérale

Date: 20141125

Docket: IMM-2397-14

Citation: 2014 FC 1127

[UNREVISED ENGLISH CERTIFIED TRANSLATION]
Montréal, Quebec, November 25, 2014

PRESENT: The Honourable Mr. Justice Shore

BETWEEN:

MARIBEL PUPO TAMAYO

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Introduction

[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 of the Refugee Appeal Division [RAD] confirming a previous decision of the Refugee Protection Division [RPD] according to

which the applicant is not a "Convention refugee" under section 96 of the IRPA or a "person in need of protection" within the meaning of section 97 of the IRPA.

II. Facts

[2] The applicant is a nurse and a citizen of Cuba. In her Basis of Claim Form and in her affidavit filed in support of her claim, the applicant alleges that on July 24, 2010, the Cuban authorities came to her workplace to force her to take part in an act of repudiation and denunciation against people who had taken part in a demonstration. The applicant refused to co-operate.

[3] Consequently, the applicant was detained for four hours, and the authorities [TRANSLATION] "opened a file" on her.

[4] The applicant then began being threatened and intimidated by the authorities. The applicant alleges that she was threatened with having her nursing credentials (which she had held for 29 years) taken away; that she was forced to work national holidays in the presence of guards; and that her work situation was made miserable by assigning her to a psychiatric hospital, by accusing her of fraud and of stealing things from the clinic, and by accusing her of misusing medical equipment.

[5] The applicant alleges that because of her open file, she can no longer work in Cuba. The applicant also claims that since discovering that she left the country, the authorities have been causing problems for her boss.

[6] After obtaining a visitor visa, the applicant left Cuba in May 2013 and subsequently claimed refugee protection in Canada.

[7] Following a hearing held on December 9, 2013, the RPD rejected the applicant's refugee protection claim, concluding that she was not credible and that she did not have a serious fear of persecution. The applicant appealed that decision to the RAD.

III. Decision

[8] In a decision dated March 13, 2014, the RAD dismissed the appeal and confirmed the decision of the RPD. First of all, the RAD concluded that in the absence of new evidence, there were no grounds for a hearing.

[9] The RAD then stated the level of deference that should be afforded to findings of the RPD, relying on decisions of the Court of Appeal of Alberta and the Court of Appeal of Québec (*Newton v Criminal Trial Lawyers' Association*, 2010 ABCA 399; *Kikino Métis Settlement v Métis Settlements Appeal Tribunal*, 2013 ABCA 151; *Laliberté c Huneault*, 2006 QCCA 929; *Parizeau c Barreau du Québec*, 2011 QCCA 1498) (RPD Decision, at paras 24-32). The RAD also stated that it performs an appeal function, not a judicial review function.

[10] The RAD therefore concluded that the standard applicable to findings of fact and findings of mixed fact and law by the RPD is reasonableness. Furthermore, the RAD stated that according to *Dunsmuir v New Brunswick*, 2008 SCC 9, its analysis must therefore deal with the justification, transparency and intelligibility of the decision-making process, as well as the

question whether the decision falls with the range of acceptable outcomes which are defensible in respect of the facts and law (RAD Decision, at paras 34-37).

[11] Finally, at paragraph 67 of its decision, the RAD concluded that the RPD had correctly concluded that the incidents experienced by the applicant that had been found to be credible did not constitute, on a balance of probabilities, persecution, and that the RPD's decision fell within the range of acceptable outcomes which are defensible in respect of the facts and law.

IV. Issue

[12] The Court finds that the RAD's interpretation of the scope of the review that it must conduct regarding the RPD's decision is the determining issue.

V. Legislative provisions

[13] The following legislative provisions concerning the role of the RAD are relevant:

Appeal	**Appel**
110. (1) Subject to subsections (1.1) and (2), a person or the Minister may appeal, in accordance with the rules of the Board, on a question of law, of fact or of mixed law and fact, to the Refugee Appeal Division against a decision of the Refugee Protection Division to allow or reject the person's claim for refugee protection.	**110**. (1) Sous réserve des paragraphes (1.1) et (2), la personne en cause et le ministre peuvent, conformément aux règles de la Commission, porter en appel — relativement à une question de droit, de fait ou mixte — auprès de la Section d'appel des réfugiés la décision de la Section de la protection des réfugiés accordant ou rejetant la demande d'asile.
Procedure	**Fonctionnement**

(3) Subject to subsections (3.1), (4) and (6), the Refugee Appeal Division must proceed without a hearing, on the basis of the record of the proceedings of the Refugee Protection Division, and may accept documentary evidence and written submissions from the Minister and the person who is the subject of the appeal and, in the case of a matter that is conducted before a panel of three members, written submissions from a representative or agent of the United Nations High Commissioner for Refugees and any other person described in the rules of the Board.

Evidence that may be presented

(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.

Hearing

(6) The Refugee Appeal Division may hold a hearing if, in its opinion, there is documentary evidence referred to in subsection (3)

(*a*) that raises a serious issue with respect to the credibility of the person who is the subject of the appeal;

(3) Sous réserve des paragraphes (3.1), (4) et (6), la section procède sans tenir d'audience en se fondant sur le dossier de la Section de la protection des réfugiés, mais peut recevoir des éléments de preuve documentaire et des observations écrites du ministre et de la personne en cause ainsi que, s'agissant d'une affaire tenue devant un tribunal constitué de trois commissaires, des observations écrites du représentant ou mandataire du Haut-Commissariat des Nations Unies pour les réfugiés et de toute autre personne visée par les règles de la Commission.

Éléments de preuve admissibles

(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.

Audience

(6) La section peut tenir une audience si elle estime qu'il existe des éléments de preuve documentaire visés au paragraphe (3) qui, à la fois :

a) soulèvent une question importante en ce qui concerne la crédibilité de la personne en cause;

(*b*) that is central to the decision with respect to the refugee protection claim; and	b) sont essentiels pour la prise de la décision relative à la demande d'asile;
(*c*) that, if accepted, would justify allowing or rejecting the refugee protection claim.	c) à supposer qu'ils soient admis, justifieraient que la demande d'asile soit accordée ou refusée, selon le cas.
Decision	**Décision**
111. (1) After considering the appeal, the Refugee Appeal Division shall make one of the following decisions:	**111**. (1) La Section d'appel des réfugiés confirme la décision attaquée, casse la décision et y substitue la décision qui aurait dû être rendue ou renvoie, conformément à ses instructions, l'affaire à la Section de la protection des réfugiés.
(*a*) confirm the determination of the Refugee Protection Division;	
(*b*) set aside the determination and substitute a determination that, in its opinion, should have been made; or	
(*c*) refer the matter to the Refugee Protection Division for re-determination, giving the directions to the Refugee Protection Division that it considers appropriate.	

VI. Positions of the parties

[14] On the one hand, the applicant submits that the RAD erred in applying the reasonableness standard and in showing deference to the decision of the RPD (*Dunsmuir*, above). The applicant argues that it is logical to conclude that the right of appeal created by Parliament through the

RAD indicates that, as an appeal tribunal, the RAD does not have to defer to the RPD. The applicant submits that the RAD's erroneous application of this deferential standard to the RPD's decision warrants the intervention of this Court.

[15] Furthermore, according to the applicant, the RPD and the RAD, which are part of the Immigration and Refugee Board [IRB], each perform a specialized role. The role of the RAD is to hear appeals from RPD decisions, which enhances the quality of IRB decisions and the level of confidence in them. According to the applicant, the RAD erred in assuming a role comparable to that of a superior court of justice rather than to that of a specialized appeal tribunal. The applicant submits that the RAD must conduct an independent analysis of the case and may recognize, where appropriate, the RPD's credibility findings. In addition, the applicant alleges that it is difficult to see how an appeal to the RAD that centers on a credibility issue would not, in fact, be an appeal *de novo*.

[16] On the other hand, the respondent alleges that the Court should apply the reasonableness standard to the RAD's decision to apply the reasonableness standard to the RPD's negative credibility findings. The respondent further argues that the RAD's choice of the applicable standard of review in a given case is not a question of law that is of vital importance to the legal system as a whole. It is, rather, a question of interpreting its home statute and its mandate, not a question of jurisdiction. With this in mind, the respondent submits that the RAD did not err in applying the reasonableness standard to the RPD's findings regarding the applicant's credibility.

[17] The respondent also argues that in the circumstances, the appeal to the RAD is not an appeal *de novo*, such that the RAD is required to defer to the RPD's findings. The role of RAD is not to reassess all the evidence or to assume the function of the RPD in its review of the appeal before it. Such an interpretation would run counter to Parliament's intention to create an effective right of appeal from decisions that would otherwise be brought before this Court. Finally, the respondent claims that the RPD's decision is sound and that the issue of the standard of review applied by the RAD is therefore not a decisive one in this case.

VII. Standard of review

[18] According to settled law from this Court, it seems that the standard of correctness should be applied to the scope of the review conducted by the RAD on appeal (*Alyafi v Canada (Minister of Citizenship and Immigration)*, 2014 FC 952 at para 8 [*Alyafi*]; *Huruglica v Canada (Minister of Citizenship and Immigration)*, 2014 FC 799, at paras 24 to 34 [*Huruglica*]; *Iyamuremye v Canada (Minister of Citizenship and Immigration)*, 2014 FC 494, at para 20 [*Iyamuremye*].

VIII. Analysis

[19] The scope of an appeal to the RAD with regard to findings by the RPD and the standard of review that applies in such an appeal have been the subject of a number of recent decisions of this Court (see *Alyafi*, above; *Triastcin v Canada (Minister of Citizenship and Immigration)*, 2014 FC 975; *Spasoja v Canada (Minister of Citizenship and Immigration)*, 2014 FC 913;

Huruglica, above; *G.L.N.N. v Canada (Minister of Citizenship and Immigration)*, 2014 FC 859; *Iyamuremye*, above; *Alvarez v Canada (Minister of Citizenship and Immigration)*, 2014 FC 702).

[20] The Court finds that the application raises a similar issue that is decisive to the outcome of the matter.

[21] First, it has been established that the RAD performs an appeal function, not a judicial review function. It is clear from the statutory and jurisprudential context (see in particular sections 110 and 111 of the IRPA and the decisions cited at paras 17 and 18, above) that the RAD must conduct an independent analysis and either confirm the RPD's decision or set it aside and substitute its own decision. It is not open to the RAD to limit its analysis to the reasonableness of the decision under appeal.

[22] In *Canada (Attorney General) v Lambie*, [1996] FCJ No 1695, the Court considered an application raising the issue of the scope of the appeal role of an appellate administrative tribunal. In that decision, Justice Marc Nadon characterized the appeal as an appeal *de novo*. In his reasons, Justice Nadon states that the appeal tribunal had a duty to assess the testimonies and the new evidence in light of all the evidence, including the evidence presented to the tribunal of first instance:

> [12] The First Tribunal, appointed pursuant to s. 49 of the *Act*, was composed of two members and, as a result, its decision was subject to an appeal to a Review Tribunal. Pursuant to ss. 56(5) of the *Act*, a Review Tribunal may, *inter alia*, render the order that in its opinion the First Tribunal appealed against should have rendered. The provision reads as follows:
>
> > (5) A Review Tribunal may dispose of an appeal under section 55 by dismissing it, or by allowing it

> and rendering the decision or making the order that, in its opinion, the Tribunal appealed against should have rendered or made.
>
> . . .
>
> [14] On the authority of the Federal Court of Appeal's decision in *Cashin v. C.B.C.*, [1988] 3 F.C. 494, I am of the view that, in the present matter, the Review Tribunal conducted a *de novo* hearing. In *Cashin*, Mr. Justice MacGuigan stated (at 501) that:
>
> > The first respondent argued that, whether the Review Tribunal heard additional evidence or not, its power to render the decision "that, in its opinion, the Tribunal appealed from should have rendered" [subsection 42.1(6)] enabled it effectively to conduct a hearing *de novo*. However, in addition to the authority of the *Robichaud* case, such an interpretation should not, it seems to me, be given to section 42.1 unless it is the clear intention of Parliament, since the bias of the law runs strongly in favour of fact-finding by the tribunal which heard the witnesses. Parliament's intention, as I read it, appears in fact to be that the hearing should be treated as de novo only if the Review Tribunal receives additional evidence or testimony. Otherwise, it should be bound by the *Kathy K* principle.

[23] In an application considering the scope of an appeal from a decision of the RPD to the RAD, Justice Luc Martineau adopted a similar reasoning in *Alyafi v Canada (Minister of Citizenship and Immigration)*, 2014 FC 952:

> [13] Additionally, not all RPD decisions may be subject to an appeal to the RAD. For example, even if a country is not part of those that are excluded from an appeal, when the RPD refers in its decision to no credible basis for the refugee claim (subsection 107(2) of the IRPA), there cannot be an appeal before the RAD (paragraph 110(2)(c) of the IRPA). Further, the RAD may enter new evidence in an appeal and decide to hold an oral hearing in cases specified by Parliament (subsections 110(3) to (6) of the IRPA). In this last case, it can probably be argued that it is a kind of *de novo* appeal, a point that I do not have to rule on today.

[24] The decisions above suggest that an appeal before a specialized appeal tribunal is an appeal *de novo*, especially when the tribunal is confronted with new evidence.

[25] This approach was also applied in *Iyamuremye*, above, at para 3, where the Court concluded that, according to the Supreme Court trilogy (*Dunsmuir v New Brunswick*, 2008 SCC 9; *Newfoundland and Labrador Nurses' Union v Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62; *Alberta (Information and Privacy Commissioner) v Alberta Teachers' Association*, 2011 SCC 61), as an appellate tribunal, the RAD must consider all the evidence presented before the RPD in order to conduct an independent assessment of the evidence on the basis of the facts and the conditions in the country in question.

[26] Furthermore, the testimony of P. Showler before the Standing Committee on Citizenship and Immigration, which the respondent raises in its memorandum, gives some indications as to Parliament's intent in creating the RAD as regards its role as the IRB's appeal division:

> It is expected that the RAD will produce two different but complementary results. By reviewing individual RPD decisions on the merits, the RAD can efficiently remedy errors made by the RPD. That, if you will, is the safety net for the RPD. However, in addition the divisions will ensure consistency in refugee decision-making by developing coherent national jurisprudence in refugee law issues. As I said to this committee before, we don't see that as a benefit simply in that it will improve the quality of our decision-making. If there is more coherent, consistent jurisprudence, we think RPD decision-makers can actually make their decisions more quickly as well (Testimony of P. Showler, *Standing Committee on Citizenship and Immigration*, March 20, 2001, online: <http://www.parl.gc.ca/HousePublications/Publication.aspx?Mode=1&Parl=37&Ses=1&DocId=1040609&File=0&Language=E>).

IX. Conclusion

[27] The Court finds that in light of the preceding analysis, and considering that the RAD applied an analytical framework akin to that of a court of law on judicial review rather than that of a specialized appeal division, the applicant's right to a formal appeal, as provided by law, was not respected. The application should therefore be allowed.

JUDGMENT

THIS COURT'S JUDGMENT is that

1. The application for judicial review be allowed;

2. There is no question to be certified.

"Michel M.J. Shore"

Judge

Certified true translation
Michael Palles

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-2397-14
STYLE OF CAUSE:	MARIBEL PUPO TAMAYO v THE MINISTER OF CITIZENSHIP AND IMMIGRATION
PLACE OF HEARING:	MONTRÉAL, QUEBEC
DATE OF HEARING:	NOVEMBER 24, 2014
JUDGMENT AND REASONS:	SHORE J.
DATED:	NOVEMBER 25, 2014

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