Federal Court  Cour fédérale

Date: 20150728

Docket: IMM-5604-14

Citation: 2015 FC 928

Ottawa, Ontario, July 28, 2015

PRESENT: The Honourable Mr. Justice Gascon

BETWEEN:

FIRAS SALEM MUNEF AJAJ

Applicant

and

CANADA (MINISTER OF CITIZENSHIP AND IMMIGRATION)

Respondent

JUDGMENT AND REASONS

I. Overview

[1] The applicant Mr. Firas Salem Munef Ajaj is a citizen of Yemen. He arrived in Canada in November 2013 and made a claim for refugee protection on the grounds that he would be persecuted for converting from Islam to Christianity if he was sent to Yemen. At his hearing, the Refugee Protection Division [RPD] of the Immigration and Refugee Board questioned Mr. Ajaj

about his Christian beliefs and conversion. On March 11, 2014, the RDP rejected Mr. Ajaj's claim on the grounds that he was not credible, given his inability to correctly answer questions about Christianity. The RPD also found it problematic that Mr. Ajaj had not attended church at Christmas because he had not realized it was important. The RPD concluded that he was neither a Convention refugee nor a person in need of protection.

[1] In April 2014, Mr. Ajaj appealed the RPD's decision to the Refugee Appeal Division [RAD] and submitted as new evidence three letters from his church to support the genuineness of his Christian beliefs. The RAD refused to admit the new evidence as it was not persuaded that the letters could not have been available before the refusal of Mr. Ajaj's claim by the RPD. The RAD further decided that it should apply reasonableness as a standard of review in assessing the RPD's decision. The RAD found that the RPD's findings were reasonable, and dismissed Mr. Ajaj's appeal.

[2] This is an application for judicial review of this July 2, 2014 decision of the RAD. In his application, Mr. Ajaj contends that the RAD erred in three respects: in applying the reasonableness standard of review in reviewing the RPD's decision, in refusing to admit his new evidence on appeal of the RPD's decision, and in not assessing an apparent ground of risk. For the reasons that follow, Mr. Ajaj's application for judicial review is allowed as I find that, regardless of the standard of review that is applicable to this Court's review of RAD decisions, the RAD erred in applying the reasonableness standard of review to the RPD's findings in the circumstances of this case, and in declining to admit Mr. Ajaj's new evidence.

[3] In light of my conclusions on these two points, I do not need to address the third alleged error relating to the RAD's alleged failure to assess a substantive ground of risk in its *sur place* analysis.

[4] There are two issues to be determined:

1. Did the RAD err in selecting reasonableness as the appropriate standard of intervention and in assessing only whether the RPD's findings were reasonable?

2. Did the RAD unreasonably interpret and apply the requirements of subsection 110(4) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [*IRPA*] regarding the admissibility of Mr. Ajaj's new evidence?

II. Background

[5] Mr. Ajaj is a citizen of Yemen, but has lived in Saudi Arabia his entire life. Due to the applicable laws in Saudi Arabia, he was not entitled to citizenship in that country and has been living there on temporary resident permits renewed every two years.

[6] Mr. Ajaj decided to convert to Christianity after university. When he informed his family of his decision to abandon the Islam faith, his father was particularly furious; he threatened to kill Mr. Ajaj and to report him to the religious police. Mr. Ajaj was forced to leave his home and to go into hiding; he fled Saudi Arabia and arrived in Canada in November 2013.

[7] Mr. Ajaj claimed refugee protection in December 2013. In Canada, he became a member of the Matthew the Apostle Oriole Anglican Church, and was formally baptized into the church on February 2, 2014.

A. *The RPD and RAD decisions*

[8] At the hearing held by the RPD in February 2014, the RPD questioned Mr. Ajaj about his belief in Christianity. The RPD noted that Mr. Ajaj answered more questions about Christianity incorrectly than he did correctly. In rejecting Mr. Ajaj's claim on March 13, 2014, the RPD highlighted credibility, and in particular the veracity of the Mr. Ajaj's Christian conversion, as the determinative issue. The RPD had credibility concerns due to Mr. Ajaj's lack of knowledge of Christianity and concluded that, on a balance of probabilities, he was not a genuine convert to this religion. The RPD also dealt with Mr. Ajaj's *sur place* claim and determined that he was not at risk of persecution from the authorities in Yemen if he returned to that country.

[9] In his appeal of the RPD's decision, Mr. Ajaj submitted three letters as new evidence for consideration by the RAD. The first letter was dated April 9, 2014 from Reverend Savage from the St. Peter's Anglican Church of Canada, stating that Mr. Ajaj had contacted the Church of St Matthew the Apostle Oriole in November 2013 while Reverend Savage was serving as the interim priest-in-charge. The second letter was from Reverend Barker, dated April 15, 2014, confirming that Mr. Ajaj had been part of the church community in the past year and had been baptized in February. The third letter was from Reverend Newland, undated, stating that she had been appointed to the parish on March 15, 2014 and only knew Mr. Ajaj for one month, but could confirm Mr. Ajaj's faithful church attendance and conversations she had with him about his conversion to Christianity.

[10] In its decision, the RAD dismissed the appeal, confirming the RPD's decision that Mr. Ajaj was neither a Convention refugee nor a person in need of protection.

[11] The RAD rejected the new evidence presented by Mr. Ajaj as inadmissible under subsection 110(4) of the *IRPA*. The RAD found that, although the documents were dated after the rejection of Mr. Ajaj's refugee claim, they all related to allegations already made at the RPD that he was a practicing Christian in Canada. The RAD acknowledged that Mr. Ajaj had argued his inability to obtain these documents in time but it was not persuaded that Mr. Ajaj could not have provided this evidence before the RPD, given how his Christian activities in Canada were central to his claim for refugee protection. The RAD noted that there was no indication in the record that Mr. Ajaj had made any efforts to provide this evidence, nor had he offered an explanation as to why he had been unable to submit the letters. The RAD denied Mr. Ajaj's application for an oral hearing, as there was no new evidence in the appeal.

[12] In assessing the merits of the appeal and in reviewing the RPD's decision, the RAD applied the standard of reasonableness as it has been defined in the context of judicial review, as Mr. Ajaj raised issues of mixed fact and law. The RAD cited *Iyamuremye v Canada (Minister of Citizenship and Immigration*), 2014 FC 494 [*Iyamuremye*] in support of its approach. The RAD also specifically referred to the reasonableness standard articulated by the Supreme Court of Canada in *Dunsmuir v New Brunswick*, 2008 SCC 9 [*Dunsmuir*].

[13] The RAD concluded that the RPD's findings regarding the genuineness of Mr. Ajaj's faith and Christian conversion were not unreasonable. The RAD found that the RPD had

engaged in a thoughtful and fair assessment of the genuineness of Mr. Ajaj's conversion, and that it was open to the RPD to review Mr. Ajaj's Christian knowledge to determine the credibility of his allegations of conversion. The RAD also noted that Mr. Ajaj ignored fundamental and basic questions that a Christian person ought to have known. The RAD concluded that it was reasonable for the RPD to expect that Mr. Ajaj would be able to provide accurate and fulsome information about his claimed religion. Furthermore, the RAD observed that the RPD's findings regarding the genuineness of Mr. Ajaj's Christian conversion were not based solely on his lack of Christian knowledge, but also on the fact that he did not attend church at Christmas because he did not know it was a big deal to go to church. The RAD found that the RPD reasonably drew an adverse credibility finding from this.

[14] Regarding the RPD's findings on Mr. Ajaj's *sur place* claim, the RAD found that the RPD appropriately applied the *sur place* test in a forward-looking analysis when assessing the treatment of Christian converts or apostates by Yemen authorities, and that the RPD's findings were reasonable. The RAD noted the RPD's conclusions that Mr. Ajaj was not a genuine practitioner of Christianity and that, on a balance of probabilities, he would not be practicing Christianity if he were to return to Yemen.

[15] The RAD concluded that the RPD's determination was reasonable.

B. ***The standard of review to be applied by the Court***

[16] The applicable standard of review has three dimensions in this application: (i) the standard to be applied by the Court to the RAD's determination of its own standard of intervention in reviewing the RPD's decision; (ii) the standard effectively selected and applied by the RAD on appeal of the RPD's decision; and (iii) the standard to be applied to the RAD's decision on the admissibility of new evidence.

[17] The last two dimensions will be treated below in the analysis of the two issues raised by the application. With respect to the standard to be applied by this Court to the RAD's selection of reasonableness as the appropriate standard of review, Mr. Ajaj submits that it is a question of law pertaining to statutory interpretation, and that it should be reviewed on a standard of correctness. Conversely, the Minister contends that deference is owed to the RAD's determination of the appropriate standard of review and that the Court should apply the reasonableness standard. The Minister acknowledges that this is counter to Justice Phelan's finding in *Huruglica v Canada (Minister of Citizenship and Immigration)*, 2014 FC 799 [*Huruglica*] but argues that recent Supreme Court jurisprudence makes it clear that for correctness to apply, the issue must be outside the tribunal's expertise and must not be closely connected to the tribunal's home statute (*McLean v British Columbia (Securities Commission)*, 2013 SCC 67 at paras 26 and 30). The Minister points out that, in reviewing RPD decisions, the RAD's functions are part of the administrative structure of the *IRPA*, in which the RAD has a high degree of expertise, that this is not a question of central importance to the legal system as a whole and outside the adjudicator's experience, and that the *IRPA* contains a privative clause in section 162.

[18] There is no need to decide the standard of review to be applied by the Court in the present case as my conclusion would be identical under either the correctness or the reasonableness standard. Suffice it to say that the law is not yet settled and continues to develop, and that this Court remains divided on the question of the standard of review to be applied by the Court in assessing the RAD's determination of the appropriate standard of its intervention in reviewing RPD decisions. The issue will be clarified and decided by the Federal Court of Appeal; in the meantime, three main approaches coexist.

[19] The first one advocates correctness. Following the comprehensive analysis of Justice Phelan in *Huruglica*, several decisions have chosen correctness as the standard of review based on the assumption that the scope of the RAD's appellate review, although a matter of interpretation by the RAD of its home statute, is a question of general importance to the legal system and is beyond the scope of the RAD's expertise (*Huruglica* at paras 25-34). Little deference is owed to an appellate tribunal's determination of the standard of review since setting the standard of review is a legitimate aspect of the superior court's supervisory role. The line of cases supporting that approach includes *Iyamuremye* at para 20; *Alvarez v Canada (Minister of Citizenship and Immigration)*, 2014 FC 702 at para 17 [*Alvarez*]; *Yetna v Canada (Minister of Citizenship and Immigration)*, 2014 FC 858 at paras 14-15 [*Yetna*]; *Spasoja v Canada (Minister of Citizenship and Immigration)*, 2014 FC 913 at paras 7-8 [*Spasoja*]; *Alyafi v Canada (Minister of Citizenship and Immigration)*, 2014 FC 952 at para 8 [*Alyafi*]; *Triastcin v Canada (Minister of Citizenship and Immigration)*, 2014 FC 975 at paras 18-19 [*Triastcin*]; *Bahta v Canada (Minister of Citizenship and Immigration)*, 2014 FC 1245 at para 10 [*Bahta*]; *Sow v Canada (Minister of Citizenship and Immigration)*, 2015 FC 295 at para 8 [*Sow*]; *Hossain v Canada (Minister of*

Citizenship and Immigration), 2015 FC 312 at paras 24-25 [*Hossain*]; *Yang v Canada (Minister of Citizenship and Immigration)*, 2015 FC 551 at paras 9.

[20] A second approach favours the reasonableness standard. Following the comprehensive decision of Justice Gagné in *Akuffo v Canada (Minister of Citizenship and Immigration*), 2014 FC 1063 at paras 17-26 [*Akuffo*], some decisions have concluded that reasonableness should be applied to the RAD's determination of the appropriate standard of review of RPD decisions, noting that it is the presumptive standard. The RAD's determination of its own standard of review is not a question of law of central importance to the legal system as a whole and falls within the expertise of the RAD, and there are no circumstances justifying a departure from the presumptive standard. This line of cases includes *Kurtzmalaj v Canada (Minister of Citizenship and Immigration)*, 2014 FC 1072 at para 24; *Genu c Canada (Ministre de la Citoyenneté et de l'Immigration)*, 2015 CF 129 at para 26 [*Genu*]; *Brodrick v Canada (Minister of Citizenship and Immigration)*, 2015 FC 491 at para 19 [*Brodrick*].

[21] The third approach was developed following the analysis of Justice Martineau in *Djossou v Canada (Minister of Citizenship and Immigration)*, 2014 FC 1080 at paras 13-37 [*Djossou*], where the Court opted for a more "pragmatic approach", refusing to decide on the standard of review question pending a resolution of this issue by the Federal Court of Appeal following the appeal of the decision in *Huruglica*. This line of cases includes decisions such as *Yin v Canada (Minister of Citizenship and Immigration*), 2014 FC 1209 at para 33 [*Yin*]; *Khachatourian v Canada (Citizenship and Immigration)*, 2015 FC 182 at para 28 [*Khachatourian*]; *Balde v Canada (Minister of Citizenship and Immigration)*, 2015 FC 624 at paras 19-20 [*Balde*].

III. Analysis

A. *Did the RAD err in selecting reasonableness as the appropriate standard of intervention and in assessing only whether the RPD's findings were reasonable?*

[22] The main issue to be decided in this case is whether the standard of review selected by the RAD was appropriate in the circumstances, when adjudicating Mr. Ajaj's appeal from the RPD's decision. This issue is clearly determinative in the present matter.

[23] There is no doubt that the RAD selected and applied the standard of reasonableness to the RPD's findings and that it did not conduct its own independent assessment of the evidence in this case. I conclude that the RAD erred in deciding that its appellate jurisdiction was confined to reviewing the RPD's findings of mixed fact and law under the standard of reasonableness. An appeal before the RAD cannot simply be reduced to a judicial review controlling the legality of the decision, and the use by the RAD of the standard for judicial review in assessing the RPD's decision thus constituted a reviewable error. The RAD also erred in actually applying it to the RPD's credibility findings while omitting to conduct its own assessment of the factual evidence. This is sufficient to set aside the RAD's decision.

[24] I am of course mindful of the fact that, at the time of the RAD's decision in July 2014, this Court had not yet commented in detail on the type of review that the RAD should apply when reviewing a decision from the RPD, and the RAD did not have the benefit of guidance from the Court's most recent jurisprudence at the time.

(1) The standard of review to be applied by the RAD

[25] This Court's jurisprudence has now consistently and repeatedly held that it is a reviewable error for the RAD to apply the judicial review standard of reasonableness to its review of the RPD's factual findings and to thus strictly perform a judicial review function. The RAD should instead perform its appeal function (*Huruglica* at paras 39, 54-55; *Spasoja* at paras 21-24; *Alyafi* at paras 10-18, 39; *Guardado v Canada* (*Minister of Citizenship and Immigration*), 2014 FC 953 at para 4; *Triastcin* at paras 25-26; *Djossou* at paras 6-7 and 37; *Nahal c Canada (Ministre de la Citoyenneté et de l'Immigration)*, 2014 CF 1208 at para 26 [*Nahal*]; *Aloulou v Canada (Minister of Citizenship and Immigration),* 2014 FC 1236 at paras 52-59, 68 [*Aloulou*]; *Bahta*, at paras 11-16; *Siliya v Canada (Minister of Citizenship and Immigration),* 2015 FC 120 at paras 19, 23 [*Siliya*]; *Khachatourian* at para 30; *Geldon v Canada (Minister of Citizenship and Immigration),* 2015 FC 374 at paras 10, 14 [*Geldon*]; *Ngandu v Canada (Citizenship and Immigration),* 2015 FC 423 at para 30 [*Ngandu*]; *Pataraia v Canada (Citizenship and Immigration),* 2015 FC 465 at paras 12-14 [*Pataraia*]; *Green v Canada (Minister of Citizenship and Immigration),* 2015 FC 536 at para 26 [*Green*]; *Ching v Canada (Minister of Citizenship and Immigration),* 2015 FC 725 at para 48 [*Ching*]).

[26] This Court has arrived at that result no matter whether it had reviewed the RAD's position on a standard of correctness or of reasonableness, and no matter whether the RAD's appellate function was qualified as true appellate or hybrid.

[27] In those numerous decisions, the Court has generally rejected the position that the RAD owes deference to the findings of the RPD and that it should apply the reasonableness standard when reviewing decisions of the RPD. An appeal before the RAD is intended to be a full fact-based appeal involving a complete review of the questions of fact, law and mixed law and fact raised in the appeal, in order to correct any error made by the RPD (*Djossou* at para 86; *Aloulou* at para 68; *Geldon* at para 14). A full fact-based appeal means that judicial review is not the appropriate model for the RAD; it is rather a proceeding where the RAD has to make its own independent assessment of the evidence. The RAD is not a judicial body but a specialized tribunal, and it cannot have been the intention of Parliament to replicate before the RAD a process of judicial review that this Court is required to undertake.

[28] However, one limited exception has been recognized by this Court's jurisprudence: the RAD does not commit a reviewable error when it applies the standard of reasonableness to the RPD's findings of pure credibility. These refer to situations where critical or determinative questions of witness credibility arise and the RPD has heard witness testimonies, or where the RPD has a particular advantage not enjoyed by the RAD (*R v NS*, 2012 SCC 72 at para 25; *Huruglica* at paras 54-55; *Akuffo* at para 39; *Allalou v Canada (Citizenship and Immigration)*, 2014 FC 1084 at paras 17-20 [*Allalou*]; *Nahal* para 25; *Khachatourian* at paras 29- 32; *Bahta* at para 16; *Sow* at para 13; *Hossain* at para 28; *Yin* at para 34; *Ngandu* at paras 31-34; *Pataraia* at paras 12-14). Conversely, when there are no pure credibility issues, such as findings that are not wholly dependent on testimony or are based on documentary evidence or on the RPD's record (including recordings), the RPD is in no better position than the RAD to make factual findings.

In such cases, the RAD is in just as good a position as a RPD member to reassess the evidence where it is alleged on appeal that the RPD erred in its assessment (*Ngandu* at paras 32-33).

[29] That said, even on such questions on pure credibility, this Court's case law has imposed an obligation on the RAD: the RAD must nonetheless conduct its own independent assessment of the evidence before deferring to these RPD credibility findings (*Huruglica* at para 47; *Njeukam v Canada (Citizenship and Immigration)*, 2014 FC 859 at paras 15, 19; *Djossou* at para 53). Stated differently, an independent assessment or analysis of the evidence by the RAD remains necessary even where some level of deference on issues of pure credibility is permitted (*Khachatourian* at para 31; *Balde* at para 23).

[30] The window in which the RAD might not necessarily commit a reviewable error in applying the judicial review standard of reasonableness is therefore quite narrow : it is restricted to the RPD's findings of pure credibility and only when it is clear that the RAD has in fact nonetheless conducted its own independent assessment of the evidence (*Yin* at para 37; *Khachatourian* at para 32; *Alyafi* at para 33; *Youkap v Canada (Minister of Citizenship and Immigration*, 2015 FC 249 at paras 36-37; *Ngandu* at para 34). Conversely, the RAD commits an error when it reviews the RPD's credibility findings against the standard of reasonableness and fails to conduct its own assessment of the evidence.

(2) The RAD applied the standard of reasonableness to all findings of the RPD

[31] On the face of the RAD's decision, there is no doubt that the RAD adopted the deferential standard of reasonableness, in respect of both questions that it discussed in its analysis of the merits of the appeal. It did so in regard of the RPD's credibility findings on the genuineness of Mr. Ajaj's faith and Christian conversion; and it did so as well with respect to the RPD's findings on Mr. Ajaj's *sur place* claim. The RAD indeed made prolific use of language associated with deference and reasonableness.

[32] This is evident throughout the decision, but nowhere more so than in its introductory section on the standard of review where, at paragraph 17, the RAD refers to and expressly cites the wording of the Supreme Court in *Dunsmuir*. The RAD affirms that the reasonableness standard it will be applying is concerned "with the "existence of justification, transparency and intelligibility in the decision-making process" and with whether the decision falls within the range of possible, acceptable outcomes which are defensible in respect of the facts and the law."

[33] This is also reflected in the following passages of the RAD's decision:

> The RAD states that it "will apply a standard of reasonableness in assessing the merits of this appeal" (paragraph 18);
>
> Both subheadings in the RAD's decision present the questions to be analysed in terms of whether the findings on Mr. Ajaj's faith and Christian conversion and Mr. Ajaj's *sur place* claim are "unreasonable";
>
> On the faith and conversion, the RAD finds that the "RPD's credibility findings were reasonable in the circumstances" (paragraph 27);

> For the *sur place* claim, the Board concludes that the "RDP's reasons are justifiable, intelligible, and transparent, and, as such its determination is reasonable" (paragraph 31).

[34] Furthermore, the language used by the RAD in the decision is also very telling about its approach. In the section on the RPD's numerous adverse credibility findings, the RAD repeatedly uses words such as "the RPD engaged in" (paragraph 20), "it was open to the RPD" (paragraphs 21, 25, 26), "the member considered" (paragraph 22), "the RPD's reasons reflect" (paragraph 22), "the RPD found" (paragraphs 23, 25), "the RPD did not engage in" (paragraph 24), "it is reasonable for the RPD" (paragraph 24), "the RPD reasonably drew" (paragraph 26), and "the RPD notes" (paragraph 26). In the section on the *sur place* claim, the RAD says: "the member did appropriately apply" (paragraph 29), "the RPD's reasons state" (paragraph 29), "the RPD did conduct" (paragraph 30), "the RPD reasonably found" (paragraph 30), and "the RPD considered" (paragraph 30).

[35] It is therefore abundantly clear from the RAD's decision how the RAD simply deferred to the RPD's findings and failed to fully carry out the kind of independent review of the evidence that is required from an appellate tribunal. In the face of these unequivocal assertions of deference made by the RAD, it would be unreasonable and in fact incorrect to conclude or assume that the RAD exercised anything but a judicial review function (*Awet v Canada (Citizenship and Immigration)* 2015 FC 759 at para 8 [*Awet*]).

[36] It is not a situation where the RAD analysed and considered documentary evidence which the RPD had not looked at or reconsidered all the evidence reviewed by the RPD, as was the case in *Hossain* (at para 30). It is more akin to a case like *Khachatourian* where the RAD did not

make its own analysis of the case, simply reviewed the RPD's factual and credibility determinations and judged them reasonable (at para 33). As acknowledged by the RAD, the question of Mr. Ajaj's faith and Christian conversion was of central importance to Mr. Ajaj's case and it was wrong for the RAD to simply defer to the RPD's findings about this. Mr. Ajaj was entitled to a first-hand assessment of the evidence and he did not receive one.

[37] I emphasize that the RPD's findings on Mr. Ajaj's *sur place* claim do not qualify as pure credibility findings as no witness testimony was involved and the RPD did not enjoy any particular advantage over the RAD and relied on documentary evidence. As such, it does not fall in the pure credibility exception carved out by the jurisprudence and the selection of the reasonableness standard by the RAD is therefore sufficient, in and of itself, to make its decision on those RPD's findings unreasonable.

(3) The RAD did not conduct its own independent analysis on credibility findings

[38] With respect to the RPD's credibility findings on Mr. Ajaj's faith and Christian conversion, this Court's jurisprudence says that the RAD's deference to such findings may be appropriate but only if the RAD actually undertook its own independent assessment of the RPD's findings. The Minister indeed argues that, even though the RAD relied on the standard of reasonableness, the decision should not be disturbed because the RAD's analysis constituted an independent analysis in any case, citing *Njeukam* at para 20.

[39] I disagree and do not accept that submission.

[40] I instead agree with Mr. Ajaj that the RAD did not undertake an independent assessment of the evidence and is therefore not saved by the Court's jurisprudence on pure credibility findings. Because the RAD is a specialized tribunal which must conduct a "full fact-based appeal", it can only owe deference to the RPD when a witness' credibility is critical or determinative or when the RPD enjoys a particular advantage, and if the RAD does its own analysis. This is not what happened in this case.

[41] It is apparent throughout its decision that the RAD relied heavily on the RPD's findings, consistently using the language of reasonableness and deference cited above. There is no evidence that, in the present case, the RAD conducted any independent assessment of its own. Furthermore, I agree with Mr. Ajaj that the RPD did not solely rely on his own observations of Mr. Ajaj or of his demeanor. The RPD's findings of credibility were not strictly dependent on Mr. Ajaj's testimony. The RPD's conclusions were rather based on plausibility findings that Mr. Ajaj was not a genuine convert in light of his limited knowledge of Christianity and his absence at church at Christmas. The RAD was equally well-placed to determine plausibility in those circumstances. The RPD did not enjoy a measurable advantage over the RAD in assessing credibility, and no deference was owed to the RPD in such circumstances, as the Court similarly found in *Bahta* and *Hossain*.

[42] This is not a situation where, like in *Yin*, the RAD reassessed the credibility findings of the RPD or went further than the RPD's analysis by reviewing other parts of the evidence. Here, the RAD simply confirmed the RPD's decision and did not conduct its own examination of the record before making its decision. It is apparent to me that the RAD did not look at the evidence

and make its own evaluation, and as such I am convinced that it did not fully assume its role as an appellate tribunal.

[43] In my view, this decision is much like those overturned by the Court in *Khachatourian* at paras 33-34 and *Ozdemir v Canada (Minister of Citizenship and Immigration*), 2015 FC 621 at paras 4-5 [*Ozdemir*]. In both of these cases, the RAD simply reviewed the RPD's credibility determinations and found them reasonable. Throughout the section on credibility, the RAD states that the RPD's credibility findings were "reasonable" and never offers its own analysis as to whether it would have reached a similar conclusion based on the evidence. In addition, as was mentioned is *Ozdemir*, "there was nothing in the RPD's credibility analysis that turned on the demeanour of the applicant in the witness box" (at para 5).

[44] I conclude that the RAD committed a reviewable error in adopting reasonableness as its standard of review, and that the exceptions developed with respect to pure credibility findings do not apply. Therefore the error is dispositive of this application (*Khachatourian* at para 39; *Geldon* at para 15).

[45] By reviewing the RPD's decision through the lens of *Dunsmuir's* reasonableness standard of review, the RAD deprived Mr. Ajaj access to the appeal process that Parliament created to the benefit of failed refugee claimants. It is well possible, as the Minister contends, that following a new determination, the result may remain the same independently of the analytical framework. However, in that process, Mr. Ajaj will then have the benefit of receiving the appeal provided for in the *IRPA* (*Aloulou* at para 70). At this point, Mr. Ajaj was not offered the appeal he should have received.

B. *Did the RAD unreasonably interpret and apply the requirements of subsection 110(4) of the IRPA regarding the admissibility of Mr. Ajaj's new evidence?*

[46] In light of my conclusion on the first issue, it would not be necessary to provide an opinion on whether the RAD erred in refusing the "new" evidence offered by Mr. Ajaj. However, I will discuss this issue as, in my view, it was also an error not to accept the additional evidence of Mr. Ajaj.

(1) The standard of review on admissibility of new evidence is reasonableness

[47] The RAD's determination of the appropriate analysis for the admissibility of new evidence under subsection 110(4) of the *IRPA* involves a tribunal considering and applying its home statute, thus attracting more deference than a correctness standard (*Dunsmuir* at paras 47-49; *Alberta (Information and Privacy Commissioner) v Alberta Teachers' Association,* 2011 SCC 61 at paras 45-46; *Canadian Artists' Representation v National Gallery of Canada,* 2014 SCC at para 13). This Court's jurisprudence on the admissibility of new evidence before the RAD has indeed confirmed that the applicable standard of review is reasonableness, both with respect to the RAD's interpretation of subsection 110(4) and to its application to the facts (*Singh v Canada (Minister of Citizenship and Immigration)*, 2014 FC 1022 at paras 36-42 [*Singh*]; *Sow* at para 9; *Ngandu* at para 13; *Ching* at para 46).

[48] When reviewing a decision on the standard of reasonableness, the analysis is concerned with the existence of justification, transparency and intelligibility within the decision-making process. Findings involving questions of facts or mixed fact and law should not be disturbed provided that the decision "falls within a range of possible, acceptable outcomes which are

defensible in respect of the facts and law" (*Dunsmuir* at para 47; *Canada (Minister of Citizenship and Immigration) v Khosa*, 2009 SCC 12 at para 59 [*Khosa*]). Under the reasonableness standard, as long as the process and the outcome fit comfortably with the principles of justification, transparency, and intelligibility, a reviewing court should not substitute its own view of a preferable outcome.

(2) The RAD unreasonably applied subsection 110(4) of the *IRPA*

[49] I find that the RAD's refusal to admit Mr. Ajaj's new evidence was not reasonable in light of the statutory requirements of subsection 110(4) and the particular context of an appeal before the RAD.

[50] Subsections 110(3) and (4) of the *IRPA* provide that the RAD may accept documentary evidence on an appeal of RPD decisions but that an appellant may only present two types of additional evidence:

> Evidence that arose after the rejection of his or her claim; or
>
> Evidence 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.

[51] The wording of the English version may arguably suggest that the provision in fact refers to three different options and that the second one should be broken down in two independent possibilities. However, the French version of subsection 110(4) makes it clear that the last two possibilities described at the end of the provision are really alternatives to one another rather than two distinct options: it refers to the "éléments de preuve (…) 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".

[52] Given the use of the word "or", there can be no doubt that the test set out in subsection 110(4) is disjunctive, not conjunctive. This means that new evidence may be accepted by the RAD either if it arose after the rejection of the claim or if it was not reasonably available or the person could not have been expected to have presented it at the time of the rejection. It therefore suffices that an appellant's new evidence meet one of those two elements for the RAD to consider accepting it. Conversely, in order for the RAD to conclude that a new piece of evidence does not meet the statutory requirements of subsection 110(4), it must consider whether the evidence fails to meet both of the conditions laid out in the provision.

[53] I observe that, even if an appellant's evidence falls into one of the two categories of evidence covered by subsection 110(4), the RAD still has the discretion to decide to accept it or not.

[54] The RAD's decision is somewhat unclear as to how it actually applied the test of subsection 110(4) of the *IRPA*. The RAD first mentions that "these documents tendered are dated after the rejection of [Mr. Ajaj's] claim" (paragraph 8), thus apparently referring to the first option of the provision. But it concludes that "the evidence contained in these letters could reasonably have been expected to have been submitted to the RPD at the time of the rejection" (paragraph 10), apparently relying on the second leg of the test. It is difficult to determine whether the RAD truly considered both options before refusing to admit the evidence.

[55] Mr. Ajaj further contends that the RAD erred in stating that there was no explanation for why the letters could not have been tendered prior to the rejection of the claim. The letter of Reverend Newland clearly stated that she had only been appointed to the parish on March 15, 2014, and had only known Mr. Ajaj for approximately one month; Mr. Ajaj could thus not have produced this letter before the RPD rejected his claim on March 13, 2014. Mr. Ajaj also points out that the information in Reverend Newland's letter and Reverend Barker's letter, regarding his church attendance since the RPD's refusal, was also information not available before the hearing.

[56] In its submissions, the Minister contends that the substance of Mr. Ajaj's new evidence should have been available for the RPD hearing, and that Mr. Ajaj provided no explanation for not providing such evidence to the RPD. The RAD had noted that the new evidence related to events that occurred prior to the determination of the RPD claim, and the RAD rejected Mr. Ajaj's explanation given that the issue was central to his claim and his counsel knew of the issues that would be raised.

[57] Pursuant to the statutory language of subsection 110(4), the RAD had to consider not only whether the additional evidence presented by Mr. Ajaj was not reasonably available or could not have been expected to be presented at the time of the rejection of the claim, but also whether the three new pieces of evidence "arose after the rejection of the claim". It was not sufficient for the RAD to conclude that this evidence did not meet the statutory requirements and could not be admitted by only assessing one of the two options. As, on their face, the date of the three letters indicated that the documents were created after the rejection of the claim, the RAD certainly was required to make a determination about this. As it is unclear whether the RAD did

or not, I cannot conclude that it made a reasonable application of the statutory requirements of the provision.

[58] In addition, the RAD appears to have ignored the particular context of a RAD appeal in its decision not to admit Mr. Ajaj's new evidence. In its submissions, the Minister drew parallels to the requirements for new evidence in a pre-removal risk assessment [PRRA] context and to the factors developed in *Raza v Canada (Minister of Citizenship and Immigration)*, 2007 FCA 385 [*Raza*]. In *Raza*, the Federal Court of Appeal had held that new evidence should be considered for its newness, credibility, relevance and materiality, in addition to any express statutory provision. The Minister cited jurisprudence where the Court has held that newly created evidence attesting to facts previously available at the time of the RPD hearing was properly excluded from assessment as new evidence under a PRRA (*Ghargi v Canada (Minister of Citizenship and Immigration)*, 2009 FC 1014; *Ghannadi v Canada (Minister of Citizenship and Immigration)*, 2014 FC 879 at paras 17-19). The Minister concluded that it was therefore reasonable for the RAD to act similarly in this case.

[59] Even though counsel for the Minister referred to the *Raza* test in its submissions, I acknowledge that the RAD did not specifically mention the *Raza* factors in its decision. However, there is no indication either that it assessed the new evidence produced by Mr. Ajaj with the flexible and generous approach advocated by this Court since the *Singh* decision and which should apply, in my view, in the context of a RAD appeal. In the circumstances, I conclude that it was also unreasonable for the RAD to adopt the strict approach it apparently took in interpreting and applying subsection 110(4) of the *IRPA* to Mr. Ajaj's new evidence.

[60] The RAD cannot merely import, and automatically transplant, the criteria from *Raza* in a determination under subsection 110(4) of the *IRPA* as the *Raza* factors developed in a PRRA review are not necessarily applicable to the admissibility of new evidence in the context of a RAD appeal. A RAD appeal is an appeal and a reconsideration of the RPD decisions whereas a PRRA officer is not supposed to revisit the RPD's factual findings. Since the role of the RAD on appeal materially differs from that of a PRRA officer, I agree with the reasoning outlined by Justice Gagné in *Singh*, at paras 49-58. In that decision, Justice Gagné discussed why the *Raza* factors developed in the context of PRRA applications cannot simply be transposed over to the RAD framework. Unlike a PRRA officer, the RAD is a quasi-judicial administrative tribunal, trusted to act as an instance of appeal of the RPD's determination of a refugee claim, with the power -- expressly granted under paragraph 111(b) of the *IRPA* -- to set aside the RPD's decision and substitute a determination that, in its opinion, should have been made. While the language formulated at paragraph 113(a) is similar to that of subsection 110(4), the RAD "considers this evidence in a very different light than does the PRRA officer" (*Singh* at para 51). The different context is an important distinguishing factor.

[61] It was indeed recognized in the *Singh* decision, and in several others having followed it, that the RAD was created to give a "full fact-based appeal" and to conduct a reconsideration of the RPD decisions (*Singh* at paras 56-57; *Khachatourian* at para 37; *Ngandu* at para 20; *Ching* at paras 55-58; *Sow* at paras 14-15; *Geldon* at para 18). Such a full fact-based appeal requires that the criteria for the admissibility of new evidence be "sufficiently flexible" to ensure that a proper appeal can occur and to afford some leeway in order to allow the claimant to respond to the deficiencies raised by the RPD. The criteria developed in *Raza* cannot simply be applied in the

context of an appeal before the RAD as they may not give the appellant the full-fledged appeal he or she is entitled to under subsection 110(4).

[62] As the *Raza* factors may not offer the accompanying flexibility to admit evidence called for in an appeal context, this Court has therefore held that it is unreasonable for the RAD to merely assume that these factors apply in the context of a RAD appeal (*Singh* at paras 56-57; *Ching* at paras 55-58).

[63] In response to *Singh*, the Minister says it will be determined on appeal and that it concerned a different factual situation. The Minister contends that, in this case, Mr. Ajaj was in a position to have the three letters disclosed earlier, whereas the evidence could not have been reasonably obtained and disclosed by the claimant in *Singh* because it was not in his possession. I do not believe this makes a material difference or renders the *Singh* principles inapplicable in this case. The criteria for the admissibility of new evidence in a RAD appeal must be sufficiently flexible, and a more open and lenient approach may have favoured the admission of the letters, given that their admission was critical to Mr. Ajaj's enjoyment of a full fact-based appeal.

[64] I agree with counsel for the Minister that an appeal to the RAD may not qualify as a true *de novo* process because of the various legislative constraints imposed on the powers of the RAD, and that it is acceptable for the RAD to verify whether the evidence is credible or trustworthy in the circumstances. But by failing to appreciate that its role is different from that of a PRRA officer and to take a more generous view towards the acceptance of additional evidence, the RAD did not give Mr. Ajaj the appeal he was entitled to (*Awet* at para 10).

[65] In the circumstances, it cannot be said that the RAD's finding on the admissibility of new evidence falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law. I therefore conclude that the RAD erred by unreasonably interpreting the statutory requirements of subsection 110(4) of the *IRPA* and by refusing to admit the new evidence produced by Mr. Ajaj on that basis. As was the case in *Geldon* at para 21, Mr. Ajaj's evidence was crucial in order to dispute the RPD's findings on his faith and conversion to Christianity and concerned a key aspect of the RPD's negative credibility finding. Such a request had to be assessed in accordance with the Court's ruling in *Singh*.

[66] The Minister further contends that, even if the letters had been admitted as new evidence, they would not have been relevant or material to the appeal and would not have changed the credibility deficiencies in the claim of Mr. Ajaj. As such, it was not unreasonable for the RAD not to admit them. I cannot agree. I cannot tell whether the new evidence would have changed the outcome or the RAD decision materially or not. I only note that the new evidence submitted by Mr. Ajaj dealt with a primary issue in his refugee claim and could have been determinative of his credibility. The three new pieces of evidence could be crucial to whether the RAD accepts or rejects the RDP's findings; or the RAD could conclude that they are not sufficient to change its analysis. It is for the RAD to decide that question, not the Court.

[67] The RAD erred in failing to consider the admissibility of the new evidence under the proper light, and I am unable to say whether a more flexible approach would have caused the RAD to accept the letters into evidence, nor whether this would have enabled Mr. Ajaj to obtain an oral hearing or given him an opportunity to satisfactorily explain the inconsistencies and

deficiencies that caused the decision-maker to make adverse findings of credibility. Because I am unable to conclude whether the RAD's decision would have been different if the new evidence had been admitted, the application for judicial review must be allowed and the decision must be sent back for redetermination.

IV. Conclusion

[68] For the reasons detailed above, I conclude that the RAD erred as it adopted the judicial review standard of reasonableness in reviewing the RPD's decision, and did not conduct its own independent assessment of the evidence on the RPD's credibility findings. Furthermore, the RAD erred in its consideration of the conditions governing the admissibility of new evidence in the context of a RAD appeal. I must, therefore, allow Mr. Ajaj's application for judicial review and order another panel of the RAD to reconsider his application for refugee protection.

[69] In the present case, the result would be the same whether a correctness standard or reasonableness standard were applied by the Court to the judicial review.

[70] Counsel for Mr. Ajaj proposed that questions be certified if the application is dismissed, some of them similar to questions already certified in *Huruglica* or *Singh*. If I had decided the case against Mr. Ajaj, I might have certified questions for appeal to preserve his procedural rights in the event that appellate jurisprudence changed the law in his favour. However, as Mr. Ajaj has been successful in this application for judicial review, and the disputed legal issues will be determined by the Federal Court of Appeal in other cases, I do not find it necessary to certify questions for appeal in this case.

JUDGMENT

THIS COURT'S JUDGMENT is that:

1. The application for judicial review is allowed;

2. The RAD decision is set aside;

3. The matter is referred back to the RAD for re-consideration of admissibility of the new evidence and re-determination on the merits by a differently constituted panel;

4. No serious question of general importance is certified for appeal.

"Denis Gascon"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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