Federal Court  Cour fédérale

Date: 20160609

Docket: IMM-4785-15

Citation: 2016 FC 646

Ottawa, Ontario, June 9, 2016

PRESENT: The Honourable Mr. Justice Boswell

BETWEEN:

ZEBENE ASFAW GEBREMICHAEL

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

[1] The Applicant is a 58 year old citizen of Ethiopia who received a visa to travel to Canada, arriving here on March 14, 2015. About a month later, he submitted a refugee claim and alleged before the Refugee Protection Division [RPD] of the Immigration and Refugee Board [IRB] that he was politically active and was tortured, beaten, and persecuted in Ethiopia due to the government's mistaken belief that he was a member of Ginbot Sebat, a political party which the Ethiopian government labels as a terrorist group. On July 13, 2015, the RPD denied the

Applicant's refugee claim, finding that he lacked credibility due to his inability to explain contradictions in when he joined a political party called the Semayawi (Blue) Party, the names of senior officials of that party, and his knowledge of the outcome of the 2014 Ethiopian elections.

[2] The Applicant appealed the RPD's decision to the Refugee Appeal Division [RAD] of the IRB, but the RAD refused the new evidence he submitted and dismissed the appeal in a decision dated October 8, 2015. The Applicant now asks this Court, pursuant to subsection 72(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [*Act*], to set aside the RAD's decision and return the matter to a different member of the RAD for re-determination.

I. The RAD's Decision

[3] In its decision, the RAD found that since there was no new admissible evidence, the appeal before it was a "true appeal" and, therefore, it proceeded to consider the RPD's decision, the submissions in respect of that decision, and to "determine whether the RPD's determination is wrong." The RAD also determined that it was necessary to conduct an independent assessment of the evidence in the record, while respecting those findings which the RPD was in an advantageous position to make, notably as to credibility and other findings of fact. On matters where the RPD had no advantage, the RAD stated:

> [15] On matters where the RPD has no advantage, the RAD will show no deference and will apply a standard of correctness, engaging in its own analysis of the evidence and reaching its own conclusion to determine if the RPD was wrong. Where the RAD finds that its conclusion does not agree with that of the RPD, the RAD will substitute its own finding and determination or, if it is unable to substitute, will refer the matter back to the RPD for redetermination.

[4] In assessing the Applicant's new evidence for purposes of the appeal, the RAD noted that the RAD had, in almost all appeals to date, applied the factors set out by the Federal Court of Appeal in *Raza v Canada (Citizenship and Immigration)*, 2007 FCA 385, 289 DLR (4th) 675 [*Raza*], in assessing evidence for purposes of subsection 110(4) of the *Act*. It also noted this Court's decision in *Iyamuremye v Canada (Citizenship and Immigration)*, 2014 FC 494, [2015] 3 FCR 393, where the Court accepted the RAD's application of the *Raza* factors to new evidence. It further noted, however, this Court's contrasting decision in *Singh v Canada (Citizenship and Immigration)*, 2014 FC 1022, [2015] 3 FCR 587, which found that the *Raza* factors are based on the language of paragraph 113(a) of the *Act* and are not transferable in the context of an appeal before the RAD. The RAD acknowledged that strictly applying the *Raza* factors may be inappropriate since those factors are not specific to subsection 110(4). Nevertheless, consideration of new evidence should not, the RAD determined, ignore other provisions of the *Act* such as subsections 162(2) and 171(a.3) or established jurisprudence based on the *Raza* factors of credibility, relevance, newness, and materiality. The RAD further determined that the materiality of new evidence should not be restrictively assessed, as *Raza* suggests, in view of the differences in a pre-removal risk assessment and a RAD appeal.

[5] The RAD refused to admit as new evidence on the Applicant's appeal a letter from the Blue Party, which post-dated the RPD's decision, because the RPD had accepted a previous letter from that party into evidence; the new letter, which the Applicant proffered to show when the Blue Party was formed, did not add anything new and the information was readily available prior to the RPD hearing. The RAD also refused to accept an internet article about political parties in Ethiopia since there was no explanation for why the article was not previously

available, nor had the Applicant demonstrated how it was relevant, material, and credible. Since there was no new evidence in support of the appeal, the RAD declined the Applicant's request for an oral hearing.

[6] As to the merits of the appeal, the RAD found that the RPD had considered and rejected the Applicant's explanations before coming to its conclusion on the Applicant's credibility. The RPD's credibility findings, the RAD found, were supportable in light of the evidence. The RAD further found that, while the RPD did directly address a report from the Ethiopian Federal Police, in view of the significant and numerous credibility findings against the Applicant, it was open to the RPD to place little weight on this report and find that it did not overcome the totality of the adverse credibility findings.

II. Issues

[7] The determinative issues on this application for judicial review, as stated in the Respondent's Further Memorandum, are whether the RAD's decision is reasonable in view of the Federal Court of Appeal's recent decisions in: (1) *Canada (Citizenship and Immigration) v Huruglica*, 2016 FCA 93, 264 ACWS (3d) 2 [*Huruglica*]; and (2) *Canada (Citizenship and Immigration) v Singh*, 2016 FCA 96, 264 ACWS (3d) 179 [*Singh*].

III. Analysis

[8] The Federal Court of Appeal determined in *Huruglica* (at para 35) that the appropriate standard of review for this Court when reviewing a decision of the RAD is one of reasonableness.

[9] Accordingly, the Court should not intervene if the RAD's decision is intelligible, transparent, justifiable, and defensible in respect of the facts and the law: *Dunsmuir v New Brunswick*, 2008 SCC 9, [2008] 1 SCR 190, at para 47. Those criteria are met if "the reasons allow the reviewing court to understand why the tribunal made its decision and permit it to determine whether the conclusion is within the range of acceptable outcomes": *Newfoundland and Labrador Nurses' Union v Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62, [2011] 3 S.C.R. 708, at para 16. The decision under review must be considered as an organic whole and the Court should not embark upon a line-by-line treasure hunt for error (*Communications, Energy and Paperworkers Union of Canada, Local 30 v Irving Pulp & Paper Ltd.*, 2013 SCC 34, [2013] 2 SCR 458, at para 54; see also *Ameni v Canada (Citizenship and Immigration)*, 2016 FC 164, 263 ACWS (3d) 745 at para 35).

A. *Did the RAD reasonably assess the RPD's Decision?*

[10] The Applicant argues, based on *Huruglica* (at para 103), that the RAD should apply a correctness standard, and that it did not do so in this case and improperly deferred to the RPD's credibility findings. In contrast, the Respondent argues that the RAD correctly reviewed the

RPD's decision on a standard of correctness and that it was entitled to give deference to the RPD on credibility concerns arising from the Applicant's oral evidence.

[11] In *Huruglica*, the Court of Appeal found (at para 78) that "the role of the RAD is to intervene when the RPD is wrong in law, in fact or in fact and law. This translates into an application of the correctness standard of review." Consequently,

> [103] … after carefully considering the RPD decision, the RAD carries out its own analysis of the record to determine whether…the RPD erred. Having done this, the RAD is to provide a final determination, either by confirming the RPD decision or setting it aside and substituting its own determination of the merits of the refugee claim. It is only when the RAD is of the opinion that it cannot provide such a final determination without hearing the oral evidence presented to the RPD that the matter can be referred back to the RPD for redetermination. …

[12] As to the degree or level of deference the RAD should afford to factual or credibility findings by the RPD, the Court of Appeal noted in *Huruglica* (at para 59) that paragraph 111(2)(a) of the *Act* "indicates that the RAD does not need to defer for factual findings." Nevertheless, "there may be cases where the RPD enjoys a meaningful advantage over the RAD in making findings of fact or mixed fact and law, because they require an assessment of the credibility or weight to be given to the oral evidence it hears"; furthermore, "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" (*Huruglica* at para 70). Although the Court of Appeal noted various possible scenarios where the RAD could defer to the RPD's determinations, it concluded in *Huruglica* (at para 74) that the RAD should be given the opportunity to develop its own jurisprudence in this regard and there was "no need … to pigeon-hole the RAD to the level of deference owed in each case."

[13] In this case, the RAD characterized its review of the RPD's decision as being a "true appeal" because it found there was no new evidence. In view of *Huruglica* though, this is a mischaracterization of the RAD's role which, as noted above, is "to intervene when the RPD is wrong in law, in fact or in fact and law" and to apply a correctness standard of review. This mischaracterization by the RAD, however, is not fatal to its decision in this case when reviewed as a whole. It is apparent upon review of the RAD's decision that it carefully considered the RPD's decision and conducted its own analysis of the record to determine whether the RPD erred or, to use the RAD's word, was "wrong" in its determination of the Applicant's refugee claim. As the Court of Appeal noted in *Huruglica* (at para 64), the ordinary meaning of "the word 'wrong' is 'not correct or true', 'incorrect,' 'mistaken': *The Oxford English Dictionary,* 3d ed., s.v. 'wrong'….". The RAD's assessment of the RPD's decision and determination of the Applicant's claim in this case was reasonable, despite mischaracterizing its role, because it is clear throughout its reasons and repeated usage of the word "wrong" that it performed a correctness review.

[14] Moreover, although the RAD in this case did not explicitly state whether the RPD benefited from an advantageous position in assessing the credibility concerns, it was not unreasonable for the RAD to defer to the RPD's findings in this regard. The RAD noted that the RPD may err by discounting the entirety of the evidence based on one or two non-determinative credibility concerns. However, this was not the case in the case before it, the RAD stated, since the credibility concerns went to the heart of the Applicant's allegations. The Court should accept the RAD's deference to the RPD's credibility concerns in this case and not "pigeon-hole the RAD to the level of deference owed in each case."

B. *Did the RAD reasonably assess the new evidence?*

[15] The Federal Court of Appeal determined in *Singh* (at para 74) that the RAD's interpretation of subsection 110(4) of the *Act* must be reviewed in light of the reasonableness standard. However, in determining the admissibility of new evidence under subsection 110(4), the RAD must comply with the explicit requirements of such subsection, while also having regard to the implicit considerations of admissibility of evidence with respect to its credibility, relevance, newness, and materiality as stated in *Raza* (see: *Singh* at paras 38 and 74). Except for the materiality of new evidence, "it is not necessary to interpret subsection 110(4) and paragraph 113(a) differently" (*Singh* at para 64). The materiality of the new evidence must be assessed in the context of subsection 110(6) of the *Act* for the sole purpose of determining whether the RAD may hold a hearing (*Singh* at para 74). Furthermore, with respect to the materiality of new evidence before the RAD, the Court of Appeal observed in *Singh* that:

> [47] …there may be a need for some adaptations to be made. In the context of a PRRA, the requirement that new evidence be of such significance that it would have allowed the RPD to reach a different conclusion can be explained to the extent that the PRRA officer must show deference to a negative decision by the RPD and may only depart from that principle on the basis of different circumstances or a new risk. The RAD, on the other hand, has a much broader mandate and may intervene to correct any error of fact, of law, or of mixed fact and law. As a result, it may be that although the new evidence is not determinative in and of itself, it may have an impact on the RAD's overall assessment of the RPD's decision.

[16] In this case, the RAD rejected the new evidence submitted by the Applicant because, in the RAD's view, the new evidence did not fall within the requirements of subsection 110(4) of the *Act* which provides that:

110 (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.	**110 (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.

[17] The Applicant argues, based on *Singh* (at para 47), that the RAD applied the *Raza* criteria unreasonably and, in particular, the materiality criteria. The Respondent argues that the RAD's assessment of the new evidence was in accord with *Singh*, and that the new evidence did not overcome the credibility findings against the Applicant, most notably his lack of knowledge about the Blue Party. According to the Respondent, the RAD properly conducted its own assessment of the evidence as a whole and the new evidence as well.

[18] The RAD in this case did not run afoul of the Court of Appeal's recent decision in *Singh*. Its treatment of the new evidence was transparent, justifiable, intelligible and, consequently, reasonable. It was reasonable for the RAD to depart from what it regarded as a "restrictive approach" to the materiality of new evidence emanating from *Raza*. In this regard, the RAD, like the Court of Appeal in *Singh*, recognized that the materiality factor from *Raza* was not altogether appropriate in the context of a RAD appeal. The RAD stated:

> [33] The Court's definition of materiality, which is appropriate for evidence presented in support of a PRRA application, seems overly restrictive when applied to evidence submitted in an appeal to the RAD. If the RAD would apply the materiality factor as set out in *Raza*, it could lead to the rejection of evidence that is capable of showing that the RPD's decision was in error, only because that evidence is not so strong that it would have resulted in

> the acceptance of the refugee claim had the evidence been before the RPD. Further, the RAD is not asking – as the PRRA officer is under *Raza* – whether the RPD decision would have been different. The RAD is considering whether the RAD thinks the determination should have been different or whether the RPD decision was in error.

[19] The only new document which may have had the effect of showing that the RPD's decision was in error was the internet article about politics and political parties in Ethiopia. However, not only did the Applicant fail to show the RAD how this article was material, he did not show how it was relevant or credible or, in line with subsection 110(4), why it was not previously available. It was not self-evident as to how or why this article was new evidence and the RAD reasonably refused to accept it, as well as the letter from the Blue Party, as new evidence.

IV. Conclusion

[20] The RAD's decision in this case was reasonable. The Applicant's application for judicial review is therefore denied. No question of general importance is certified. There is no award of costs.

JUDGMENT

THIS COURT'S JUDGMENT is that: the application for judicial review is denied; no question of general importance is certified; and there is no award of costs.

"Keith M. Boswell"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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