Federal Court  Cour fédérale

Date: 20180302

Docket: IMM-3821-17

Citation: 2018 FC 243

Vancouver, British Columbia, March 2, 2018

PRESENT: The Honourable Mr. Justice Mosley

BETWEEN:

JUAN ANDRES RODRIGUEZ MARIN

Applicant

and

MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Introduction

[1] The Applicant, a citizen of Columbia, seeks judicial review of a decision by the Refugee Appeal Division (RAD) of the Immigration and Refugee Protection Board confirming the decision of the Refugee Protection Division (RPD) finding that the Applicant is neither a Convention refugee nor a person in need of protection pursuant to s 96 and s 97 of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA or the Act].

[2] For the reasons that follow, the application is dismissed.

II. Background

[3] The Applicant came to Canada from the United States on or about July 15, 2014 and claimed refugee protection in December 2014. He claimed to be the subject of extortion by a paramilitary group called the Black Eagles. In January 2014, he said, the Black Eagles demanded money from him. They made threats by way of phone calls and a letter that was delivered with a funeral wreath. In June 2014, the Applicant was allegedly shot at by two men on motorcycles while he was in a taxi.

[4] In support of his claim, the Applicant filed a police report referencing the funeral wreath incident as well as pictures of the funeral wreath and the letter from the Black Eagles. He also provided photos of the taxi that he was in when he was allegedly shot at.

[5] The RPD found that the Applicant was not credible and lacked a subjective fear of persecution. The RPD drew multiple adverse inferences from the Applicant's testimony and evidence, such as his return to Columbia after initially fleeing to the United States, his delay in telling his friends and family about the extortion attempt, his failure in making a refugee claim in the US and his delay in making a claim in Canada. The RPD also dismissed the corroborative evidence finding that the Applicant could have invented the story and the photographs could have been obtained on the web.

[6] The Applicant appealed this decision to the RAD and included new evidence obtained from his lawyer in Columbia. The RAD refused to admit any of the new evidence, confirmed the decision of the RPD and dismissed the appeal.

[7] On July 20, 2016, the Honorable Mr. Justice René LeBlanc allowed the judicial review and remitted the matter back to a different member for redetermination: *Marin v Canada (MCI)*, 2016 FC 847 [*Marin*]. Justice LeBlanc found that the RAD did not properly apply the standard of review and failed to conduct an independent assessment of the evidence as set out by the Federal Court of Appeal in *Canada (MCI) v Huruglica*, 2016 FCA 93; *Marin*, above at paras 35-36. However, he found that the RAD's decision with regard to the refusal to admit new evidence was reasonable and did not interfere with this aspect of the RAD decision: *Marin*, above at paras 28-29.

[8] Upon the matter being remitted to the RAD for reconsideration by a different member, the RAD sent a notice to counsel requesting any additional submissions to be filed within 30 days. The Applicant took this opportunity to file a letter and a further affidavit which included new evidence. Upon the reconsideration, the RAD refused to accept the new evidence pursuant to s 110(4) of the *IRPA*, confirmed the credibility findings made by the RPD and dismissed the appeal (RADII).

III. Issues

[9] This application for judicial review raises the following two issues for consideration:

A. Did the RAD err in declining to admit the affidavit as "new evidence"?

B. Did the RAD breach the Applicant's right to procedural fairness by raising a "new issue" and not giving the Applicant an opportunity to respond?

IV. Standard of review

[10] There is no dispute between the parties and I agree that the standard of review for questions of law involving the tribunal's interpretation of its home statute is reasonableness: *Dunsmuir v New Brunswick*, 2008 SCC 9 at para 47 [*Dunsmuir*]. The standard of review for questions of procedural fairness is correctness: *Canada (MCI) v Khosa*, 2009 SCC 12 at para 43; *Zhou v Canada (MCI)*, 2013 FC 313 at para 12. In particular, when allegations that the RAD breached procedural fairness by making additional credibility findings without sharing those concerns with the parties, the standard of review is correctness: see *Kwakwa v Canada (MCI)*, 2016 FC 600 at para 19, citing *Ortiz v Canada (MCI)*, 2016 FC 180 at para 17; *Husian v Canada (MCI)*, 2015 FC 684.

V. Relevant legislation

[11] The relevant provisions of the *IRPA* read as follows:

Convention refugee	Définition de réfugié
96 A Convention refugee is a person who, by reason of a well-founded fear of persecution for reasons of race, religion, nationality, membership in a particular social group or political opinion,	96 A qualité de réfugié au sens de la Convention — le réfugié — la personne qui, craignant avec raison d'être persécutée du fait de sa race, de sa religion, de sa nationalité, de son appartenance à un groupe social ou de ses opinions politiques :
(a) is outside each of their countries of nationality and is unable or, by reason of that fear, unwilling to avail	a) soit se trouve hors de tout pays dont elle a la nationalité et ne peut ou, du fait de cette crainte, ne veut se

themself of the protection of each of those countries; or

(b) not having a country of nationality, is outside the country of their former habitual residence and is unable or, by reason of that fear, unwilling to return to that country.

Person in need of protection

97 (1) A person in need of protection is a person in Canada whose removal to their country or countries of nationality or, if they do not have a country of nationality, their country of former habitual residence, would subject them personally

(a) to a danger, believed on substantial grounds to exist, of torture within the meaning of Article 1 of the Convention Against Torture; or

(b) to a risk to their life or to a risk of cruel and unusual treatment or punishment if

(i) the person is unable or, because of that risk, unwilling to avail themself of the protection of that country,

(ii) the risk would be faced by the person in every part of that country and is not faced generally by other individuals in or from that country,

(iii) the risk is not inherent or incidental to lawful sanctions, unless imposed in disregard of accepted international standards, and

(iv) the risk is not caused by the inability of that country to provide adequate health or medical care.

réclamer de la protection de chacun de ces pays;

b) soit, si elle n'a pas de nationalité et se trouve hors du pays dans lequel elle avait sa résidence habituelle, ne peut ni, du fait de cette crainte, ne veut y retourner.

Personne à protéger

97 (1) A qualité de personne à protéger la personne qui se trouve au Canada et serait personnellement, par son renvoi vers tout pays dont elle a la nationalité ou, si elle n'a pas de nationalité, dans lequel elle avait sa résidence habituelle, exposée :

a) soit au risque, s'il y a des motifs sérieux de le croire, d'être soumise à la torture au sens de l'article premier de la Convention contre la torture;

b) soit à une menace à sa vie ou au risque de traitements ou peines cruels et inusités dans le cas suivant :

(i) elle ne peut ou, de ce fait, ne veut se réclamer de la protection de ce pays,

(ii) elle y est exposée en tout lieu de ce pays alors que d'autres personnes originaires de ce pays ou qui s'y trouvent ne le sont généralement pas,

(iii) la menace ou le risque ne résulte pas de sanctions légitimes — sauf celles infligées au mépris des normes internationales — et inhérents à celles-ci ou occasionnés par elles,

(iv) la menace ou le risque ne résulte pas de l'incapacité du pays de fournir des soins médicaux ou de santé

	adéquats.
Person in need of protection	Personne à protéger
(2) A person in Canada who is a member of a class of persons prescribed by the regulations as being in need of protection is also a person in need of protection.	(2) A également qualité de personne à protéger la personne qui se trouve au Canada et fait partie d'une catégorie de personnes auxquelles est reconnu par règlement le besoin de protection.
[…]	[…]
Evidence that may be presented	Éléments de preuve admissibles
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.
[…]	[…]

VI. Analysis

A. *Did the RAD err in declining to admit the affidavit as "new evidence"?*

[12] The RAD found that the new evidence provided did not meet the requirements at s 110(4) of the IRPA since the evidence could have been filed before the rejection of the claim. The RAD noted the following at paras 19 and 20:

> [19] I am of the opinion that the documents do not meet the criteria set out in subsection 110(4). First, although the documents arose after the rejection of the claim, they do not concern events that occurred after the RPD's decision. I also find that they are documents that one could have expected to be filed before the rejection of the claim, considering that they corroborate an important element: the claimant's allegation concerning the attack on his person as he was getting into a taxi. The appellant had been able to take steps to obtain the documents corroborating his allegations through a Colombian lawyer less than one month after the RPD rendered its decision. Nothing explains why those steps were not taken in preparation for the hearing before the RPD, especially when, at that hearing, the appellant explained that he had obtained the photographs through the taxi company's insurance company, but that he had been unable to obtain the report from the insurance company because [translation] "he had no contact from whom to obtain the information." Despite this, less than one month after the RPD rendered its decision, he was able to hire a Colombian lawyer, who obtained a copy of the appellant's file from the *fiscalia*, without apparent difficulty. It was up to the appellant to "present all the evidence that is available at the time". Consequently, I find that one could have expected the appellant to obtain those documents in preparation for his hearing before the RPD, because he was represented by experienced counsel and because the documents were available and constituted independent and objective evidence of his allegations. As a result, I find that the RPD's decision has no incidence on the relevance and availability of the documents prior to the rejection of the decision.
>
> [20] For these reasons, I reject the admissibility of the documents submitted as new evidence, because they do not meet the explicit conditions set out in subsection 110(4) of the lRPA.
>
> [Footnotes omitted]

[13] The RAD also commented on the letter and affidavit provided in response to the letter sent by the RAD inviting the Applicant to make submissions in response to the Federal Court decision. As noted above, Justice LeBlanc had found that the RAD reasonably rejected new evidence but granted the judicial review on the ground that the RAD should have been less deferential to the RPD's credibility findings following the decision by the Federal Court of Appeal in *Huruglica,* above.

[14] The Applicant submitted written submissions and filed an affidavit with information that had not been previously tendered. At paragraph 22, the RAD noted that the Applicant's counsel argued that the affidavit attested to the Applicant's lack of knowledge of the existence and availability of the new evidence (the *fiscalia's* file) and to the fact that the new evidence was obtained after his lawyer paid a bribe to the Colombian police. However, the RAD noted, no explanation was provided as to why the documents met the requirements in s 110(4) of the *IRPA*:

> [23] These submissions were made after the appellant's record was filed. No explanation was given as to why the appellant had been unab1e to provide the document (the appellant's affidavit of August 30, 2016) and the submissions not previously provided with the appellant's record that included his request for new evidence to be admitted. This affidavit explains why he had been unaware that he could access the police documents submitted as new evidence. I find that these explanations should have been provided with his request for documents to be admitted as new evidence. In the absence of an explanation, I find that the criteria set out in subsection 110(4) have not been met. I therefore do not allow this document to be admitted as new evidence.

[15] The Applicant submits that the RAD committed an error of law since the finding that the new evidence could have been provided to the RAD earlier is not the legal test pursuant to s 110(4) of the *IRPA*.

[16] The Respondent argues that refugee claimants are expected to put their "best foot forward" in advancing their claims. Subsection 110(4) of the *IRPA* is one of the system's mechanisms for achieving that purpose and narrowly restricts new evidence on appeal to the RAD. The Applicant failed to submit the additional affidavit evidence before the RPD to corroborate his claim. He only sought to do so after his claim was rejected by the RPD. The Respondent submits that the RAD decision in this regard was reasonable since the Applicant did not offer a satisfactory explanation for why it was not submitted earlier. Similar to the first judicial review where the Court found that rejecting the new evidence was reasonable, the Respondent submits that this is merely another attempt to cure a defective record *ex post facto*.

[17] The Federal Court and the Federal Court of Appeal have consistently held that the RAD may refuse to admit evidence that could have reasonably been presented during the RPD's hearing. The test for the admissibility of new evidence under s 110 (4) is that discussed by the Federal Court of Appeal in *Raza v Canada (MCI)*, 2007 FCA 385, at para 13 in the context of s 113 (a) of the IRPA. This was confirmed by the Federal Court of Appeal in *Canada (MCI) v Singh*, 2016 FCA 96 at paras 40, 44:

> 40 It must be assumed that Parliament's decision to use near-identical wording did not happen by chance. Under a well-known rule of interpretation, it must be presumed that Parliament, when it uses the same wording as a provision that has already been interpreted by the courts, intends to rely on that interpretation: see Elmer A. Driedger, Construction of Statutes, 2nd ed., Toronto, Butterworths, 1983 at p. 125.
>
> […]
>
> 44 Indeed, in my view it would be difficult to argue that the criteria set out by Justice Sharlow in Raza do not flow just as implicitly from subsection 110(4) as from paragraph 113(a). It is difficult to see, in particular, how the RAD could admit documentary evidence that was not credible. Indeed, paragraph 171(a.3) expressly

> provides that the RAD "may receive and base a decision on evidence that is adduced in the proceedings and considered credible or trustworthy in the circumstances." It is true that paragraph 110(6)(a) also introduces the notion of credibility for the purposes of determining whether a hearing should be held. In that regard, however, it is not the credibility of the evidence itself that must be weighed, but whether otherwise credible evidence "raises a serious issue" with respect to the general credibility of the person who is the subject of the appeal. In other words, the fact that new evidence is intrinsically credible will not be sufficient to warrant holding a hearing before the RAD: this evidence would still be required to justify a reassessment of the overall credibility of the applicant and his or her narrative.

[18] The Federal Court has routinely followed the approach set out in *Raza* and confirmed in *Singh*, above, to admit new evidence pursuant to s 110(4) of the *IRPA*: see for example *Tuncdemir v Canada (MCI)*, 2016 FC 993 at paras 32-34; *Acikgoz v Canada (MCI)*, 2018 FC 149 at paras 24-28; *Jeyakumar v Canada (MCI)*, 2017 FC 241 at paras 19-20; *Belek v Canada (MCI)*, 2017 FC 196 at para 5; *Vijayakumar v Canada (MCI)*, 2016 FC 1160 at paras 12-14; *Khan v Canada (MCI)*, 2016 FC 855 at para 43.

[19] The Applicant points to language in para 23 of the decision where the RAD states that the explanations offered in the affidavit of August 30, 2016 should have been provided with the request for documents to be admitted as new evidence. At first impression, this could suggest that the RAD misapplied the criteria in s 110(4). However, it is clear from the decision as a whole that the RAD found that the additional affidavit was filed after the rejection of the claim and the Applicant offered no reason why it could not have been presented to the RPD.

[20] In the result, I find that there is no basis to interfere with the RAD’s finding to reject the new evidence pursuant to s 110(4) of the *IRPA*.

B. *Did the RAD breach the Applicant's right to procedural fairness by raising a "new issue" and not giving the Applicant an opportunity to respond?*

[21] The RAD found that the documentary evidence filed by the Applicant contradicted his testimony. This was one of several adverse credibility findings that the RAD made in relation to important elements of the Applicant's refugee protection claim. Others included inconsistencies in his testimony regarding the persons targeted by the Black Eagles' threats and what is indicated in the documentary evidence, inconsistencies and the implausibility of the chronology of events on the day of the attempt on his life and his delay in claiming refugee protection in Canada without a reasonable explanation.

[22] At paragraph 54 of the decision, the RAD found that the time stamps on the notarization of documents submitted by the Applicant contradicted his chronology of the events:

> Upon reviewing the documentary evidence filed by the appellant, I note that the time shown on the complaint filed with the *fiscalia* is 2:55 pm, whereas the notary apparently certified the authenticity of the appellant's signature on the complaint filed with the *fiscalia* at 9:30:01 am. The documentary evidence not only contradicts the chronology of the events, as described by the appellant at the hearing, but is implausible. I cannot understand how the notary could have attested to the authenticity of the appellant's signature on a document and its contents, when the document was apparently produced after the certification. The appellant also testified that he had gone to the notary after obtaining the photographs, and then to the *fiscalia* to file a complaint, and finally to the ombudsman's office. The accident photographs and his signature on the complaints filed with the *fiscalia* and with the ombudsman's office were apparently certified at 9:28:3 l; 9:28:31 and 9:30:01, respectively. I therefore give no probative value to those documents and I find that the inconsistency and implausibility of the appellant's testimony undermine his credibility. Considering the above-mentioned credibility issues regarding key elements of his refugee protection claim, namely, the inconsistencies in the appellant's testimony regarding the persons targeted by the *Aguilas*

> *Negra's* threats and what is indicated in the documentary evidence; the little probative value given to the threatening letter of June 10, 2014, and the inconsistencies and implausibilities [sic] in the chronology of events that occurred on June 18, 2014, the day of the attempt on his life; I find that the RPD did not err in concluding that the appellant's behaviour is not credible and rather indicates a lack of subjective fear.
>
> [Emphasis added]

[23] The Applicant submits that his right to procedural fairness was breached because the contradictions between the notary stamps and his testimony identified by the RAD were not raised at any point during the RPD hearing. Had this issue been raised directly with the Applicant, he argues, he could have asked for the opportunity to go through the documents with the RAD to provide an explanation as to how the documents were notarized and the timing of the events following the attack.

[24] The Applicant submits that procedural fairness requires that an applicant be given an opportunity to respond to any new issue raised by the RAD. The jurisprudence on this question in the context of RAD proceeding begins with *Ching v Canada (MCI)*, 2015 FC 725 at para 71, where Madame Justice Kane found that:

> […] The RAD should first consider if the issue is "new" and if failing to raise the new issue would risk injustice. If the RAD pursues the new issue, it seems clear that procedural fairness requires that the party or parties affected be given notice and an opportunity to make submissions.

[25] Madame Justice Kane drew these principles from the decision of the Supreme Court of Canada in a criminal case; *R v Mian*, 2014 SCC 54, [2014] 2 SCR 689 [*Mian*]. In *Mian,* the Supreme Court had addressed the question of what constitutes a new issue on appeal at para 30:

> An issue is new when it raises a new basis for potentially finding error in the decision under appeal beyond the grounds of appeal as framed by the parties. Genuinely new issues are legally and factually distinct from the grounds of appeal raised by the parties (see *Quan v. Cusson*, 2009 SCC 62, [2009] 3 S.C.R. 712, at para. 39) and cannot reasonably be said to stem from the issues as framed by the parties. It follows from this definition that a new issue will require notifying the parties in advance so that they are able to address it adequately.
>
> [Emphasis added]

[26] While this was in the context of a criminal case, Madame Justice Kane held that the principles were also applicable in the administrative context.

[27] In *Koffi v Canada (MCI)*, 2016 FC 4 [*Koffi*] at para 38, Justice Kane found that a RAD decision may be reasonable even where it had made independent findings of credibility against an applicant, without putting it before the applicant and giving him or her the opportunity to make submissions. This would be the case where "the RAD did not ignore contradictory evidence on the record or make additional findings on issues unknown to the applicant".

[28] In *Kwakwa v Canada (MCI)*, 2016 FC 600, Mr. Justice Gascon reviewed Justice Kane's comments and those of Mr. Justice Shore in *Ortiz v Canada (MCI)*, 2016 FC 180 [*Ortiz*], which also dealt with independent findings made by the RAD. At para 24 of *Kwakwa*, Justice Gascon drew the following conclusion from these decisions:

> In other words, the RAD is entitled to make independent findings of credibility or plausibility against an applicant, without putting it before the applicant and giving him or her the opportunity to make submissions, but this only holds for situations where the RAD does not ignore contradictory evidence or make additional findings or analyses on issues unknown to the applicant.

[29] Justice Gascon distinguished this situation from that in *Sary v Canada (MCI)*, 2016 FC 178 at para 31, in which he had found that the RAD did not examine any "new questions" but rather referred to evidence in the record which supported the conclusions reached by the RPD. He concluded that the RAD in *Kwakwa* had made a number of findings about the identity documents submitted by the applicant that were not raised or addressed specifically by the RPD. As a result, Justice Gascon found that the process followed by the RAD was not fair to the applicant and breached procedural fairness.

[30] In this matter, the Applicant contends the RAD made "additional findings on issues unknown to the applicant." The case is therefore distinguishable, he argues, from *Koffi,* above, *Ibrahim v Canada (MCI)*, 2016 FC 380, or *Tan v Canada (MCI)*, 2016 FC 876 where the issues in question had already been canvassed by the RPD and the RAD simply evaluated the evidence in a different manner.

[31] The Respondent submits that the issue of credibility was the cornerstone of the RPD's decision and the sole basis for the Applicant's appeal to the RAD. Therefore, the Respondent argues, the RAD's finding that the time stamps on the documentary evidence contradicted the Applicant's testimony before the RPD cannot be considered a "new issue".

[32] The Applicant's credibility, documentary evidence, chronology of events, and the taxi shooting incident were at issue during the RPD's decision. The RPD commented on the Applicant's own corroborative evidence and held that it was contradicted by his own testimony:

> […]

> And after all the claimant had been through, I don't find it credible that he actually - if any of this were true, that he thought he would be actually returning to Colombia at this point, funeral wreaths, letter from the Black Eagles. This information can be taken right off the web.
>
> With the credibility findings in this case, including the reporting to the Ombudsmen office for protection, I find the documents in this case don‘t make this a credible claim, no matter how many pages they are.
>
> Moreover, the claimant's own corroborative evidence materially contradicted his Basis of Claim Form narrative and testimony. The claimant testified and wrote in his Basis of Claim Form that the only physical assault to himself were the shots to the cab on June 18th, 2014.
>
> And yet when he filed his criminal complaint with the office of the prosecutor, which is written in first person - it's his statement -- he writes on page 35 of Exhibit 4, "I have been physically assaulted and recently unsuccessfully shot at several times."
>
> When I put this contradiction to the claimant, it indicates physical assault and shot at - two different events - he stated there must have been a problem with the writing of the complaint.
>
> I find (indiscernible) to the contrary. These are clearly two separate allegations, separated with the words "and recently". The document is taken from him. It's his story.
>
> I find he obviously doesn’t know his own story and take a negative inference of the claimant's credibility.
>
> […]

[33] In the second appeal, the Applicant sought to appeal the RPD’s decision on the sole ground that the “RPD erred by concluding that the appellant lacked credibility regarding the essential elements of his refugee protection claim, when the extensive evidence filed on the record corroborated his allegations”: see RAD decision at para 14.

[34] In conducting its analysis, the RAD found that the Applicant was not credible for various reasons, including the time stamps that contradicted his testimony:

> "[54] […] The accident photographs and his signature on the complaints filed with the *fiscalia* and with the ombudsman's office were apparently certified at 9:28:3 l; 9:28:31 and 9:30:01, respectively. I therefore give no probative value to those documents and I find that the inconsistency and implausibility of the appellant's testimony undermine his credibility.
>
> […]
>
> [62] Considering the appellant's level of education; the fact that he already feared for his life in March 2014 and ended up leaving Colombia in July 2014, because he no longer felt safe there despite the changes in his daily routine and residence; the fact that the information on the process for claiming refugee protection in Canada is easily accessible on the Internet; the fact that he failed to claim refugee protection at the first opportunity upon his arrival in the United States; and the fact that he waited five months before filing his refugee protection claim in Canada having entered the country illegally; I am not satisfied as to the explanations given by the claimant. I find that the RPD did not err by drawing a negative inference regarding the appellant's credibility from his having delayed filing his refugee protection claim.
>
> [63] Taking into account the above-mentioned credibility issues relating to important elements of his refugee protection claim, notably the inconsistencies in the appellant's testimony regarding the persons targeted by the *Aguilas Negras's* threats and what is indicated in the documentary evidence; the little probative value given to the threatening letter of June 10, 2014; the inconsistencies and implausibilities of the chronology of events that occurred on June 18, 2014, the (day of the attempt on his life; and lastly, his delay in claiming refugee protection in Canada, without any reasonable explanation being given; the RAD determines that the appellant failed to establish the essential elements of his refugee protection claim, on a balance of probabilities.
>
> RAD's decision, para 54, 63.

[35] The RAD's comment on the time stamps is a factual finding on the applicant's credibility regarding the documentary evidence on the record; the sole ground on appeal to the RAD. In essence, the RAD made an explicit finding in its decision and the Applicant is now before this Court contending that his right to procedural fairness was breached since he was not given an opportunity to respond to this finding.

[36] In my view, the RAD's finding does not meet the definition of a "new issue" as set out by the Supreme Court of Canada in *Mian* at para 30 and adopted in immigration cases by this Court, as discussed above. The discrepancies between the time stamps and the negative credibility findings – in other words, the documentary evidence on record and the Applicant's credibility – cannot be said to be "legally and factually distinct from the grounds of appeal raised by the parties."

[37] The RAD can make independent credibility findings, without putting them to the Applicant and giving him an opportunity to make submissions: *Koffi*, above at para 38; see also *Ortiz*, above at para 22. In other words, the failure to give an applicant an opportunity to respond to a credibility finding does not necessarily constitute a breach of procedural fairness.

[38] In any event, I agree with the Respondent that the Applicant's credibility was the determinative issue before the RPD and the RAD and that there were sufficient reasons to dismiss his appeal apart from the inconsistencies in the documents identified by the RAD.

[39] As a general rule, a breach of procedural fairness will render a decision void and the matter will be remitted for reconsideration. However, there is a limited exception to this rule. A reviewing court may disregard a breach of procedural fairness "where the demerits of the claim are such that it would in any case be hopeless": *Mobil Oil Canada Ltd et al v Canada-Newfoundland Offshore Petroleum Board*, [1994] 1 SCR 202 at 228, [1994] SCJ No. 14 (QL) [*Mobil Oil*] citing W Wade, Administrative Law (6th ed. 1988) at 535; see also *Yassine v Canada (Minister of Employment and Immigration)*, (1994) 172 NR 308, 27 Imm LR (2d) 135 at para 9 (FCA) [*Yassine*]. In other words, the limited exception applies in instances where the outcome is legally inevitable: *Canada (AG) v McBain*, 2017 FCA 204 at para 10 [*McBain*].

[40] This limited exception, first set out in *Mobil Oil*, above, has been applied by the Federal Court and the Federal Court of Appeal: see for example *Canada (Minister of Transport, Infrastructure and Communities) v Farwaha*, 2014 FCA 56 at para 117 [*Farwaha*]; *Ilaslan v Hospitality & Service Trades Union, Locale 261*, 2013 FCA 150 at para 28 [*Ilaslan*]; *Yassine*, above; *McBain*, above; *Canada (Human Rights Commission) v Canada (Attorney General)*, 2012 FC 445 at para 203; *Dhaliwal v Canada (MCI)*, 2011 FC 201 at paras 25-26; *Singh v Canada (MCI)*, 2013 FC 807 at para 1.

[41] In the circumstances, even if I had been satisfied that the time stamps constituted a "new issue" requiring that the Applicant be given an opportunity to respond, this is not a case in which I would have found it necessary to return the matter for reconsideration before a different RAD. The alleged breach was not of such a material nature that it would have justified quashing of the

RAD's decision and remitting it for a third determination by a different officer: see for example *Farwaha*, above at para 117; *Ilaslan*, above at para 28.

[42] It is apparent that the decision maker would have reached the same decision notwithstanding the time stamp differences and no purpose would be achieved by remitting the appeal for reconsideration. Although it may have been preferable for the RAD to have given the Applicant notice of the inconsistencies and to have provided him with an opportunity to offer an explanation of the time stamp differences, the result was inevitable given the RAD's other findings.

[43] For these reasons, the application is dismissed. No serious questions of general importance were proposed for certification.

JUDGMENT in IMM-3821-17

THIS COURT'S JUDGMENT is that the application is dismissed. No questions are certified.

"Richard G. Mosley"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-3821-17
STYLE OF CAUSE:	JUAN ANDRES RODRIGUEZ MARIN V MINISTER OF CITIZENSHIP AND IMMIGRATION
PLACE OF HEARING:	VANCOUVER, BRITISH COLUMBIA
DATE OF HEARING:	FEBRUARY 26, 2018
JUDGMENT AND REASONS:	MOSLEY, J.
DATED:	MARCH 2, 2018

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