Federal Court  Cour fédérale

Date: 20141114

Docket: IMM-6639-13

Citation: 2014 FC 1072

Ottawa, Ontario, November 14, 2014

PRESENT: The Honourable Madam Justice Gagné

BETWEEN:

ELJOT KURTZMALAJ

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Overview

[1] The Refugee Protection Division [RPD] of the Immigration and Refugee Protection Board found Mr. Eljot Kurtzmalaj, at the time a 16 year old Albanian citizen, neither a *Convention* refugee nor a person in need of protection as: i) although he had established his identity to the satisfaction of the RPD, the fact that he had not filed his original Albanian passport and birth certificate was found to undermine his overall credibility; ii) he did not have a

credible subjective fear of persecution in Albania at the hands of his violent father; iii) in any case, he had an internal flight alternative [IFA] in Tirana, the capital of Albania; and finally, iv) state protection was available for the applicant in his own country. The Refugee Appeal Division [RAD] applied the reasonableness standard developed by the Supreme Court of Canada in the context of judicial review by superior courts of justice, and found that the RPD made unreasonable errors, namely, in issues i) and ii), but the RAD viewed the IFA analysis and finding as reasonable. As such, the RAD found that it did not need to rule on the state protection.

[2] The only subject matter covered by this application for judicial review is therefore whether an IFA is available for the applicant in Tirana, Albania.

[3] For the reasons discussed below, this application for judicial review will be granted.

II. Background

[4] The applicant's mother, father and brother live in Albania. His uncle, Altin Malaj, was designated as his representative before the RPD.

[5] The applicant alleged before the RPD a well-founded fear of persecution based on the risk of being abused or perhaps killed by his alcoholic and violent father who often beat him and considered him his property.

[6] Three years prior to his refugee claim, the applicant's father began hitting and threatening him for trying to protect his mother and brother from his father's assaults. Moreover, his father forced the applicant to work and would confiscate the money earned to buy himself alcohol.

[7] As a result, the applicant absented himself from school. One day, he showed up badly bruised, leading the principal and his teacher to figure out his family situation. They asked to meet with his father, who refused the invitation.

[8] The applicant eventually decided to live at a friend's home, whose parents agreed to take him in. The friend's family then helped him leave the country, in part by obtaining a false Italian passport.

[9] The applicant alleged that his friend's parents thought the police could not help him in any way. Instead of filing a complaint with the country's authorities, they helped him flee abroad. The applicant consulted with several adults, and they all offered the same advice.

[10] The applicant left for Canada where his uncle accepted to help him. He flew through the Netherlands and England, and arrived on January 16, 2013. He claimed refugee status two days later.

[11] The RPD concluded that even if the applicant had a credible fear, which in its view was not the case, he had an IFA in Tirana, noting that he was able to obtain all the false documents he

needed in order to travel on his own to the Netherlands and Canada also that he was very mature for his age and not physically challenged.

[12] On May 2, 2013, the RPD informed the applicant he was neither a *Convention* refugee nor a person in need of protection.

[13] The applicant appealed to the RAD.

[14] On July 22, 2013, the RAD confirmed the RPD's decision.

III. The Impugned RAD's IFA finding

[15] The RAD analyzed the standard of review applicable to the RPD decision. Invoking *Newton v Criminal Trial Lawyers' Association*, 2010 ABCA 399 [*Newton*], it held that the RPD, as a first instance tribunal, is owed deference, and thus found the grounds of appeal had to be assessed on a reasonableness standard because the issues raised questions of fact or of mixed fact of law. In its view, the RAD is not intended to act as a *de novo* appeal board, but must review whether the RPD decision falls within a range of possible outcomes, as understood by the Supreme Court of Canada's pronouncements in *Dunsmuir v New Brunswick*, 2008 SCC 9.

[16] All four questions were assessed by the RAD under the reasonableness standard as they were all questions of mixed fact and law.

[17] As indicated above, the determinative issue before the RAD was the available IFA in Tirana. Here is how the RAD disposed of the issue:

> [73] Although I certainly would have articulated these reasons differently, I feel that the RPD's finding in relation to the availability of an internal flight alternative falls within the range of possible, acceptable outcomes that are defensible in respect of the facts and the law. Consequently, the RPD did not err in applying the legal test for an internal flight alternative to the circumstances of this case.

IV. Issues and Standard of Review

[18] This application for judicial review raises the following issues:

1. *Does the RAD owe deference to the RPD's findings of fact or mixed fact and law?*
2. *Is the RAD's IFA analysis reasonable?*

[19] The applicant does not take a position on the standard of review that this Court should apply when reviewing the RAD's selection of its own standard of intervention when sitting in appeal of the RPD's finding of fact or mixed fact and law.

[20] The respondent argues that questions which concern interpretation of a tribunal's own statute and function are reviewable on the reasonableness standard (*Alberta (Information and Privacy Commissioner) v Alberta Teachers' Association*, 2011 SCC 61).

[21] The question of the RAD's standard of intervention is one that is closely tied to its function and process—matters that require its high degree of expertise—which includes an interpretation of its role as situated in the administrative structure set out by the home statute.

All of these factors suggest that deference is owed to the RAD's decision with respect to the selection of the appropriate standard of review.

[22] Moreover, the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA] contains a privative clause. Section 162 gives the RAD exclusive jurisdiction over all questions of law, fact and jurisdiction. This section militates in favour of deference to the RAD on all questions of law, regardless of how the applicant characterizes them.

[23] For the reasons set out in *Akuffo v Canada (Minister of Citizenship and Immigration)*, 2014 FC 1063 (docket IMM-6640-13) [*Akuffo*], heard the same day as this case and argued by the same counsel for the applicant, I agree with the respondent.

[24] In *Akuffo*, I found that in light of the consistent and firm position taken by the Supreme Court (*Nor-Man Regional Health Authority Inc v Manitoba Association of Health Care Professionals*, 2011 SCC 59; *Communications, Energy and Paperworkers Union of Canada, Local 30 v Irving Pulp & Paper Ltd*, 2013 SCC 34, [2013] 2 SCR 458; *McLean v British Columbia (Securities Commission)*, 2013 SCC 67; and *Canadian National Railway Co v Canada (Attorney General)*, 2014 SCC 40), the interpretation of sections 110, 111, 162 and 171 of the IRPA by the RAD did not involve questions of central importance to the legal system as a whole or any special circumstances that would require review on a correctness standard.

V. Analysis

1. Does the RAD owe deference to the RPD's findings of fact or mixed fact and law?

[25] The parties do not agree which standard of intervention the RAD must apply in appeal of RPD decisions on questions of fact or mixed fact and law.

[26] The applicant argues that the RAD should have used the correctness standard. The RAD does not owe the RPD the same level of deference as the Alberta Court of Appeal found in *Newton*. *Newton* concerns the basic structure and interrelationship of the tribunals in Alberta that review the conduct of police officers when that conduct is called into question during disciplinary proceedings under the *Police Act*, RSA 2000, c P-17. The initial investigation and prosecution of police misconduct is performed within the police forces, by senior police officers. Appeals are then available to the Law Enforcement Review Board, which is a civilian tribunal. The Court of Appeal held that the court of first instance (the Presiding Officer) has considerable expertise over the matter, more so than did the appellate tribunal (Law Enforcement Review Board), which provides civilian oversight. As such, the Presiding Officer's greater expertise led to a greater deference owed. The appellate tribunal cannot ignore the Presiding Officer's determinations and conduct in a *de novo* hearing, using the correctness standard.

[27] Meanwhile, the RPD and RAD are both divisions of the same tribunal. Both possess specialized knowledge and skills with regard to adjudicating refugee claims, therefore, there is no need for the RAD to defer to the RPD.

[28] It makes little or no sense to have the same tribunal favour deference to itself. This defeats the purpose of having an appeal decision at all.

[29] The RAD should answer the same question initially answered by the RPD: "Is the claimant a refugee or person in need of protection?" It should not ask itself "Was the RPD's decision reasonable?"

[30] The respondent argues that an appellate administrative tribunal should apply the reasonableness standard when reviewing questions of fact or mixed fact and law from the decision of a lower tribunal. In reviewing a decision of the RPD which concerns pure issues of law, the RAD should use the correctness standard. Indeed, the enabling legislation, function of the tribunal, and relevant jurisprudence, establish that the appropriate standard of review on questions of fact and mixed fact and law is reasonableness.

[31] The RPD is the trier of fact of first instance and, as such, will have the benefit of seeing the claimant and witnesses. It is, therefore, generally better placed than the RAD to assess factual and evidentiary issues, although both are engaged in refugee determination. The RAD must proceed without a hearing, on the basis of the RPD record of the proceedings, but may accept documentary evidence and written submissions. As such, it is primarily a "paper-based" appeal. The RPD is therefore better placed than the RAD to assess factual and evidentiary issues except perhaps, in exceptional instances where the RAD holds a hearing.

[32] Since the case has been heard, this Court has issued several decisions dealing with the same issues and questions of general importance have been certified. Again, for a review of these decisions, I refer the parties to my reasons in *Akuffo*.

[33] After reasons were issued by this Court in *Iyamuremye v Canada (Minister of Citizenship and Immigration)*, 2014 FC 494; *Garcia Alvarez v Canada (Minister of Citizenship and Immigration)*, 2014 FC 702; *Eng v Canada (Minister of Citizenship and Immigration)*, 2014 FC 711; and *Huruglica v Canada (Minister of Citizenship and Immigration)*, 2014 FC 799, the parties requested and were granted permission to file additional written submissions. In these submissions, the parties reasserted their positions by citing some of the new jurisprudence particularly favourable to their arguments. With a few caveats that have no impact on the case at bar, I agree with Justice Phelan's analysis of the role and duties of the RAD when sitting in appeal of RPD decisions and when reviewing questions of fact or mixed fact and law.

[34] As for the RPD's IFA finding, it did not turn on the applicant's credibility or on a question for which the RPD enjoyed a particular advantage. Further, the RAD has equal expertise in assessing an IFA; thus, the RAD owed no deference to the RPD on the issue and it was, in my respectful view, necessary for it to review the relevant evidence and to formulate its own opinion.

[35] I am also of the view that the jurisprudence concerning the standard of intervention applicable to appellate Courts does not apply to the RAD any more than does the jurisprudence developed in the context of judicial review by superior Courts. The rules of evidence employed by the RPD are quite different, and far less restrictive, than those used by Courts of justice. The evidence involved in the former is often limited to the testimony of the claimant along with an abundance of documentary evidence; may it be identity documents, letters from family members, psychological reports or country conditions documents. In my view, the RPD does not enjoy a

particular advantage when reviewing such documentary evidence, even if they raise questions of fact or questions of mixed fact and law. In addition, on all issues normally raised before the RPD, the RAD has an equal or even greater expertise to deal with them.

2. Is the RAD's IFA analysis reasonable?

[36] In his written submissions to the RAD, the applicant's counsel directly contested the analysis by the RPD and referred to the following relevant evidence on the record that contradicted the RPD's finding on this issue:

1. There was no evidence the applicant had ever stayed in Tirana;
2. He knew nobody in Tirana;
3. He wasn't safe on his own in Tirana;
4. He would receive no help or support in Tirana;
5. He had nowhere else to go, except to his uncle in Montréal;
6. There are no social safety nets in Albania for children or teens at risk;
7. As a 16 year old child, he had few resources to fall back on as far as money, skills or education to set himself up in a different location.

[37] The RAD ignored this evidence in upholding the RPD's finding. Instead, the RAD merely repeated the RPD's analysis on this issue. The RAD provided no explanation why it was reasonable for the RPD to ignore evidence which suggested the applicant potentially faced undue hardship if he were forced to relocate to Tirana.

[38] It was unreasonable for the RAD to accept the RPD's decision at face value and ignore what could be relevant evidence regarding the minor applicant's personal circumstances. The failure to properly assess the IFA analysis is a reviewable error.

[39] All the more so, considering the RAD had at least some reservations about the RPD's analysis; yet it failed to note the weaknesses.

VI. Conclusion

[40] Thus, in my view, the applicant was entitled to benefit from a true appeal of the IFA finding, which he did not. His application for judicial review will be granted.

* * *

[41] At the hearing, counsel for the applicant suggested the following question for the purpose of certification:

- What scope and role did the Parliament intend the RAD to have over RPD decisions?

[42] By letter to the Court, counsel for the respondent opposed certification because the question is too broad and not dispositive of the case. Counsel for the respondent also goes further and suggests that, should the Court deem it appropriate to certify a question, it should be the same question proposed to Justice Phelan in *Huruglica*.

[43] I view the following question of general importance as being determinative of the present application for judicial review and I think it would also be determinative of an appeal:

- Within the Refugee Appeal Division [RAD]'s statutory framework where the appeal proceeds on the basis of the Refugee Protection Division [RPD] record of the proceedings, what is the level of deference, if any, owed by the RAD to the RPD's findings of fact or mixed fact and law?

JUDGMENT

THIS COURT'S JUDGMENT is that:

1. The application for judicial review is granted and the file is remitted back to a differently constituted panel of the Refugee Appeal Division for redetermination;

2. The following question is certified:

   - Within the Refugee Appeal Division [RAD]'s statutory framework where the appeal proceeds on the basis of the Refugee Protection Division [RPD] record of the proceedings, what is the level of deference, if any, owed by the RAD to the RPD's findings of fact or mixed fact and law?

"Jocelyne Gagné"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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