



RAD File No. / N° de dossier de la SAR : MB3-04275

Private Proceeding / Huis clos

Reasons and decision – Motifs et décision

Person who is the subject of the
appeal

XXXX XXXX

Personne en cause

Appeal considered / heard at

Montreal, Quebec

Appel instruit à

Date of decision

February 24th, 2014

Date de la décision

Panel

Stephen J. Gallagher

Tribunal

Counsel for the person who is the
subject of the appeal

M^e Jessica Lipes

Conseil de la personne en cause

Designated representative

N/A

Représentant désigné

Counsel for the Minister

N/A

Conseil du ministre

REASONS AND DECISION

[1] Mr. XXXX XXXX is appealing a decision of the Refugee Protection Division (RPD) rejecting his claim for refugee protection. The Appellant has not presented new evidence and has not requested an oral hearing.

I. DETERMINATION OF THE APPEAL

[2] Pursuant to ss. 111(1)(a) of *Immigration and Refugee Protection Act* (IRPA), the Refugee Appeal Division (RAD) confirms the determination of the RPD, namely, that Mr. XXXX is neither a “Convention Refugee” pursuant to s. 96 of IRPA nor a “person in need of protection” pursuant to s. 97 of IRPA.

II. BACKGROUND

[3] The Appellant, who is a citizen of Algeria and a resident of XXXX XXXX which is a city in the Kabylie region of Algeria, alleges that he is at risk of being attacked and possibly killed by individuals he describes as ‘terrorists’. The Appellant alleges that his problems began in XXXX 2012 when he faced extortion and paid terrorists 200,000 Algerian dinars to avoid property damage.

[4] The Appellant alleges that they returned and demanded more money but the Appellant was not able to pay them so a date was set for him to come up with the money. The Appellant, who secured a Canadian tourist visa, travelled to Canada in XXXX 2012.

[5] With respect to the alleged risk from terrorists, the Appellant states that he hoped that his problems would blow over while he was in Canada. When this allegedly proved not to be the case and with the Appellant’s Canadian visa running out, in May 2013 the Appellant sought Canada’s protection. This claim was denied in a RPD decision dated October 11, 2013. The Appellant submitted a Notice of Appeal, thus appealed this decision, which was received by the IRB on November 12, 2013.

III. SUBMISSIONS

[6] The Appellant argues that the RPD was committed errors in its decision. The Appellant argues that the RPD reached false credibility conclusions because the RPD relied on imputed implausibilities. The Appellant argues that such an analysis should only be used in the ‘clearest of cases’ which would not fit this case.

[7] The Appellant also argues that the RPD erred by dismissing the Appellant’s reason for waiting until his visa was expiring before seeking Canada’s protection. In addition, the Appellant argues that the RPD erred in its assessment of country conditions in Algeria. The Appellant argues that there is little if any protection for him in Algeria if he were to return.

[8] With respect to outcome, the Appellant argues that this appeal of the RPD’s decision should be ‘allowed’ and that I should grant the Appellant Canada’s protection. The Appellant argues that in the alternative, this case should be returned to the IRB for a redetermination.

IV. ANALYSIS:

Issue 1: Should I accept the Appellant’s argument that the RAD’s standard of review should be that of correctness?

[9] The Appellant submits that I should evaluate the RPD’s decision in this case based on ‘correctness’. This is to say the RAD owes ‘little, if any’ deference to RPD decision-making. The Appellant identified numerous features of the RAD legislation and rules, which provide the RAD tools that go beyond those of the Federal Court when it adjudicates RPD decisions (Memorandum of Argument, Paragraph 12). The Appellant understands that established jurisprudence would hold that the Federal Court would use a ‘reasonableness’ standard in this case. The Appellant argues, however, that the Federal Court’s approach need not extend to the RAD. According to the Appellant,

“All these differences between the RAD and the Federal Court logically lead us to the conclusion that the RAD has a different role than the federal court. The RAD is a true appeal division and not a reviewing court, and it should operate as such. Moreover, given that we already have a Federal Court to review decisions from the IRB, it is logical to conclude that the legislator intended a different purpose for the RAD. (Memorandum of Argument, Paragraph 14).”

[10] I cannot accept this argument with respect to this appeal. The core of this appeal is the Appellant's argument that the RPD reached a wrong conclusion with respect to his credibility and the credibility of the claim. It is true that the RAD has many new tools to work with. At the same time, however, the logic of the IRB system is that the RAD appeal process should normally be party driven and 'paper based' and that hearings should be reserved for cases that fall within the conditions of s. 110(6) of IRPA. Given that the RAD is expected to bring finality to decisions of the RPD, the clear implication is that in relatively straightforward cases, such as this, which turns on the RPD's credibility assessment, the standard should be reasonableness.

[11] My conclusion on this issue partly derives from a reading of a decision of the Alberta Court of Appeal in *Newton v. Criminal Trial Lawyers' Association* (2010) ABCA 399, which is one of the few Canadian judicial decisions where the role of an appellate branch of a specialized knowledge tribunal is analyzed. The *Newton* decision provides an analysis of the role of an Alberta based appellate board vis-à-vis a first instance determination process (undertaken by a 'presiding officer') to consider whether a *de novo* hearing is required in every case where there is an appeal on a question of fact. The Court in this case notes that "(t)he Board is not a tribunal of first instance, and cannot simply ignore the proceedings before the presiding officer, and the conclusions reached by him" (Paragraph 82). The Court went on to conclude that: "a decision on such questions of fact by the presiding officer, as the tribunal of first instance, are entitled to deference. Unless the findings of fact are unreasonable, the Board should not interfere" (Paragraph 95).

[12] I conclude that an analysis of the RPD's credibility assessment, which in this case I view to be the determinative issue, involves an analysis of issues of fact and using *Newton* as a guide I conclude that such issues attract a deferential standard of review which is 'reasonableness'. My objective is therefore to review the credibility elements of the RPD's decision for reasonableness, which is defined in the jurisprudence as the "existence of justification, transparency and intelligibility within the decision-making process [and also with] whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law". This understanding flows from *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190.

Issue 2: Did the RPD reach a conclusion on the credibility of the claimant and his claim, which was ‘unreasonable’?

[13] In this claim credibility is the determinative issue and the Appellant argues that in a number of areas the RPD reached wrong credibility conclusions. The Appellant argues that the RPD made two implausibility findings, which were unwarranted. The first is that as a civilian it is implausible that the Appellant would be a target for terrorists. The Appellant argues that while documentation does reference attacks on security forces, foreign nationals and government officials, the RPD is wrong to conclude that attacks on civilians do not occur or for the RPD to conclude that, to use the RPD phrase identified as key by the Appellant, it “defied logic” that this would occur (Memorandum of Argument, Paragraph 27).

[14] The Appellant also argues that the RPD erred in finding that the actions of the terrorists to negotiate and grant terms to the Appellant is implausible. Again, the Appellant draws attention to the high threshold to be met before it is acceptable for the RPD to reach credibility conclusions based on an implausibility. Specifically the Appellant identifies jurisprudence that requires that conclusions related to implausibility be reached only in the “clearest of cases” (Memorandum of Argument, Paragraph 33).

[15] My reading of the RPD decision is that when taken together the picture that emerges is to use the RPD’s words, “highly improbable” (RPD, Paragraph 12). The documentation identified by the RPD implies commitment and indoctrination on the part of terrorist groups in Algeria. Generally the targets are the foreigners and the institutions of government and the means are distinctly violent. I find it reasonable for the RPD to raise a credibility concern with respect the thrust of the Appellant’s allegations. This is based on the RPD’s observation that the allegations involve the sole targeting of one civilian (the Appellant), the negotiation of a settlement which would require a return visit of the terrorists and the absence of violence regardless of the fact that the Appellant had not met the negotiated conditions set by the terrorists. The RPD views the behaviour of the alleged terrorists identified by the Appellant as inconsistent with the documentation, which uses terms such as ‘Islamic extremists’ ‘attacks’ and ‘killing’ with references to stealth and the use of the element of surprise. As a result I find the RPD’s adverse credibility conclusion in this area to be reasonable.

[16] Furthermore, I note that the RPD in its decision identifies other contradictions in the evidence provided by the Appellant. Whether the RPD erred in these elements of this analysis is not addressed by the Appellant in his appeal. For example, the RPD notes that there was a contradiction between testimony suggesting that he was not concerned for the safety of his family which is viewed by the RPD as inconsistent with the “concern” expressed by the Appellant in his “written story” (RPD, Paragraph 15). The RPD also notes a contradiction between the BOC Question 2(b), which notes that the terrorists threatened his father and testimony where the Appellant states that his father, to use the words of the RPD, “did not have any problems with the terrorists”. Finally, the RPD notes a ‘significant’ inconsistency in the testimony between what was said early in the hearing about the risk faced by his neighbours compared to what was said about the interaction between his neighbours and the terrorists later on (RPD, Paragraph 17). These contradictions and inconsistencies are identified by the RPD (“for all the aforementioned reasons”) as constitutive of the overall credibility assessment (RPD, Paragraph 18).

[17] A further element of the RPD’s credibility assessment relates to the fact that the Appellant waited until his visa was expiring before making a refugee claim. The Appellant argues that the jurisprudence would allow that it “should not be held against” a claimant not to seek protection soon after arrival if the individual has a non-expired visa (Memorandum of Argument, Paragraphs 37-45).

[18] I cannot accept this argument with respect to the specific circumstance of the Appellant in this case. The Appellant is testifying that he knows that the terrorists will not stop to seek him out. The Appellant argues that there is nowhere in Algeria to hide. The Appellant is also arguing that the terrorist regularly visit his brothers and have asked them about him on occasion. I find it reasonable for the RPD to conclude, based on the fact that months passed after the Appellant is understood to have been aware that there was ‘no hope’ of his problems going away and two months after his family advised him not to return, that there is an inconsistency in the logic of the story of the Appellant. Specifically, if the story were true the RPD would expect the Appellant to have made a protection claim at an earlier date. I note that the RPD asked the Appellant to clarify his actions and that the RPD concluded that the Appellant did not “satisfactorily” explain this inconsistency. Again, I find it reasonable for the RPD to reach an adverse credibility conclusion on this basis.

[19] At this point my reading of the RPD decision is that he has identified credibility issues with respect to the profile of the Appellant, contradictions between information submitted on the refugee application forms and testimony and inconsistencies within the testimony. The RPD has also found inconsistencies between the severity of the risk allegations and the actions of the Appellant to seek protection (delay in claiming). Upon examining the submissions of the Appellant, I note that the Appellant's arguments hold that the RPD should conclude that it is 'possible' that the Appellant is telling the truth in the areas examined by the Appellant (implausibility analysis). I must conclude however, that in terms of breadth, this analysis is not comprehensive because it does not look at the contradictions and inconsistencies examined by the RPD.

[20] In addition, even in those areas examined by the Appellant, the weight of argument advanced by the Appellant (implausibility and delay in claiming) is insufficient for me to conclude that it is unreasonable for the RPD to reach its aggregate negative credibility conclusion.

Issue 3: Did the RPD err in its assessment of the “protection available to the Applicant in Algeria?”

[21] The Appellant argues that RPD erred in its implied conclusion that attacks had ceased in the Appellant's home area (Memorandum of Argument, Paragraph 55). The implication might be that it would be unreasonable for the RPD to expect the Appellant to approach authorities given that he fears reprisals at the hands of the terrorists. This would be the counter to the RPD's conclusion that given the proactive nature of the government's response to terrorism and perhaps the success of government forces, the fact that the Appellant has not approached the government for protection or a response is a credibility issue.

[22] I note that the Appellant identifies several documentary sources (Memorandum of Argument, Paragraphs 49-54) the significance of which is that terrorist attacks continue in the Kabylie region. I note however, that these quotes reinforce other concerns of the RPD. In a review of 2011 'terrorist incidents' the targets are all either foreigners or state security forces (Memorandum of Argument, Paragraph 50 citing October 31, 2012 Algeria National Documentation Package, Tab 10.1). In addition, the attacks themselves are horrific and the

government's response of raids and sweeps leading to many terrorist being killed, does not fit the profile and the relatively benign tone of the incidents alleged by the Appellant.

[23] In addition, I note that the RPD's credibility concern is that given the proactive nature of state security operations ("Considering the efforts made by Algeria and the many terrorists who have been arrested or killed recently" (RPD, Paragraph 23)), the RPD would expect the Appellant to seek out state protection or intervention which he alleges he has not attempted. Although on its own this credibility concern might not be viewed as important given the response of the Appellant that these terrorists might seek retribution, in the context of other issues noted above, this constitutes one more indication to the RPD that the allegations of the Appellant are not trustworthy. I must conclude that the logic of the RPD with respect to its assessment of the Appellant's credibility is reasonable.

[24] Overall, after reviewing the evidence before me, I conclude that it is reasonable for the RPD to reach a conclusion that the Appellant has not met his burden of showing that his allegations are true, on a balance of probabilities. Overall, I conclude that the RPD's decision "falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law".

REMEDIES

[25] For all these reasons, I confirm the determination of the RPD, namely, that Mr. **XXXX** **XXXX** is neither a "Convention refugee" nor a "person in need of protection". Therefore, this appeal is dismissed.

Stephen J. Gallagher

Stephen J. Gallagher

February 24, 2014

Date

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