



RAD File No. / N° de dossier de la SAR : VB3-02197

Private Proceeding / Huis clos

Reasons and decision – Motifs et décision

Person(s) who is(are)
the subject of the appeal

XXXX XXXX XXXX XXXX

Personne(s) en cause

Appeal considered / heard at

In Chambers at
Vancouver, BC

Appel instruit à

Date of decision

January 8, 2014

Date de la décision

Panel

Douglas Fortney

Tribunal

Counsel for the person(s) who is(are)
the subject of the appeal

Robert Kincaid
Barrister and Solicitor

Conseil(s) du (de la/des)
personne(s) en cause

Designated representative

N/A

Représentant(e) désigné(e)

Counsel for the Minister

N/A

Conseil du ministre

REASONS FOR DECISION

[1] XXXX XXXX XXXX XXXX (the “appellant”), a citizen of Colombia, appeals a decision of the Refugee Protection Division (the “RPD”) rejecting her claim for refugee protection.

DETERMINATION OF THE APPEAL

[2] Pursuant to paragraph 111(1)(a) of the *Immigration and Refugee Protection Act* (the “Act”),¹ the Refugee Appeal Division (the “RAD”) confirms the determination of the RPD, namely, that XXXX XXXX XXXX XXXX is neither a Convention refugee pursuant to section 96 of the *Act* nor a person in need of protection pursuant to section 97 of the *Act*. This appeal is therefore dismissed.

BACKGROUND

[3] The appellant fears persecution at the hands of her ex-common-law husband, XXXX XXXX XXXX. Mr. XXXX XXXX was working for the XXXX XXXX when he was arrested for extortion and he was incarcerated for almost five years. While in prison the appellant’s husband requested her to retrieve a delivery from some unknown persons. However, these persons did not attend the meeting. The appellant later learned that the delivery was a large amount of money and that her husband was now accusing her of stealing this money from him. When her husband was released from prison he was physically abusive towards the appellant. The appellant’s husband threatened to kill her and would not let her see her son.

[4] The appellant left the family home and began to live in a number of other places. However, her husband was able to locate her in these locations. The appellant left Colombia in XXXX or XXXX 2011 travelling by air from Bogota, Colombia to Mexico City. She remained in Mexico before travelling to the United States in XXXX 2011. She remained in the United States until travelling to Canada on XXXX 2013.

¹ *Immigration and Refugee Protection Act* (the “Act”), S.C. 2001, c. 27.

[5] The appellant initiated her refugee claim with the Canada Border Services Agency in Vancouver on March 12, 2013.

[6] The RPD heard the appellant's refugee protection claim on August 13, 2013. The RPD's reasons for the decision were delivered orally with written reasons and a Notice of Decision dated September 10, 2013.

[7] The appellant was represented at her RPD hearing by different legal counsel than for this appeal.

[8] The RPD's written reasons dated September 10, 2013, stated that the appellant's case for refugee protection was rejected. The determinative issue in this claim was credibility.

Submissions

[9] The appellant's submissions identify the following grounds for this appeal: whether the RPD Member has failed to consider relevant evidence on an issue before making adverse credibility findings.

[10] The appellant has requested that the RAD, under subsection 111(b) of the *Act*, set aside the determination of the RPD and substitute a determination that the appellant is a Convention refugee or person in need of protection, or in the alternative, refer the matter back to a different Member of the RPD for redetermination.

[11] Counsel for the appellant has submitted that the standard of review in this appeal should be reasonableness for issues of fact and mixed law and fact. For the reasons given below, I agree with this submission of counsel.

[12] The Minister has not intervened in this appeal.

Consideration of New Evidence

[13] No new evidence has been submitted in support of this appeal.

Application for an Oral Hearing

[14] The appellant has requested an oral hearing pursuant to subsection 110(6) of the *Act*.

[15] Subsection 110(3) of the *Act* requires that the RAD proceed without a hearing, on the basis of the RPD Record, while allowing the RAD to accept documentary evidence and submissions from the Minister and the appellant.

[16] According to subsection 110(6), the RAD may hold a hearing if, in its opinion, there is documentary evidence referred to in subsection 110(3) that raises a serious issue with respect to the credibility of the appellant, that is central to the RPD decision, and that, if accepted, would justify allowing or rejecting the refugee protection claim.

[17] When read together, subsections 110(3), (4), and (6) establish that the RAD must not hold a hearing in an appeal such as this unless there is new evidence,² in which case the RAD may hold a hearing if that new evidence raises a serious issue with respect to the credibility of the appellant, is central to the RPD decision, and that, if accepted, would justify allowing or rejecting the refugee protection claim.

[18] As discussed above, no new evidence has been submitted in support of this appeal. As such, the RAD must proceed without a hearing in this appeal.

Standard of Review

[19] Although the *Act* sets out grounds for appeal as well as possible remedies, it does not specify the standard of review to be applied by the RAD.

² Subsection 110(4) of the *Act*.

[20] In *Dunsmuir*,³ the Supreme Court of Canada considered the foundations of judicial review and the applicable standards of review, concluding that there are two standards of review, correctness and reasonableness. *Dunsmuir* has limited applicability to the RAD, however, which is not a reviewing court but rather an administrative appellate body. In *Khosa*,⁴ the Supreme Court gave broad deference to a tribunal's interpretation of its own statute but again, this was not specifically in the context of an appeals tribunal reviewing the decision of a tribunal of first instance. As the RAD is a statutory creation, the standard of review must be extracted from the legislation.

[21] I find that the issues raised in this appeal as to credibility are issues of fact.

[22] In *Newton*,⁵ the Alberta Court of Appeal, having considered *Dunsmuir* and other jurisprudence, considered the standard of review to be applied by an appellate administrative tribunal to a decision of a lower tribunal. The Alberta Court's analysis is therefore relevant in the context of the RAD, which has considered the factors set out in *Newton*.

[23] The *Newton*⁶ factors deal with the standard of review to be applied by an appellate administrative tribunal to the decision of an administrative tribunal of first instance, such as is the case with the RPD and RAD. Based on the guidance in *Newton*, the RAD focused on the factors listed below to determine the standard of review. The contextual approach to assessing which factors are most appropriate in setting the standard of review has been established in *Khosa*.⁷ The most significant factors to consider in establishing the standard of review of a decision by a tribunal of first instance by an appellate tribunal are:

- the respective roles of the RPD and RAD in the context of the *Act*;
- the expertise and advantageous position of the RPD Member compared to that of the RAD; and
- the nature of the question in issue.

³ *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190.

⁴ *Canada (Minister of Citizenship and Immigration) v. Khosa*, 2009 SCC 12, [2009] 1 S.C.R. 339.

⁵ *Newton v. Criminal Trial Lawyers' Association*, 2010 ABCA 399, at para. 43.

⁶ *Ibid.*, at para. 44.

⁷ *Canada (Minister of Citizenship and Immigration) v. Khosa*, 2009 SCC 12, [2009] 1 S.C.R. 339.

[24] Both the RPD and the RAD derive their jurisdiction from and interpret the same home statute: the *Immigration and Refugee Protection Act*. Subsection 162(1) of the *Act* gives each Division, including the RPD, “in respect of proceedings brought before it under this *Act*, sole and exclusive jurisdiction to hear and determine all questions of law and fact, including questions of jurisdiction.” The RAD has been given the supervisory jurisdiction to decide appeals of RPD decisions related to refugee protection on questions of law, of fact, or of mixed law and fact.⁸ The level of deference which the RAD provides to the RPD depends on the questions at issue as addressed above.

[25] The presence of a right of appeal does not warrant a correctness standard of review given the prescribed relationship between the RPD and RAD, and the limits imposed on the RAD in the *Act*.

[26] The RAD finds that the RPD is to be provided with deference on questions of fact as it relates to the assessment of the claim for protection. The RPD is a tribunal of first instance which has been given the authority in the *Act* to make a decision to accept or reject a claim for protection.⁹ RPD Members have expertise in interpreting and applying the *Act*, as well as are experts in assessing claims based on country conditions. The RPD must conduct a hearing¹⁰ and assesses the totality of the evidence, including evidence related to the credibility of the appellant and witnesses, after it has had an opportunity to see the appellant, hear his testimony and question him.

[27] In contrast to the RPD's authority to assess a claim for protection, the *Act* limits the RAD's ability to gather and consider evidence. The RAD is not a tribunal of first instance but exists to review the decision made by the RPD. The RAD must proceed without a hearing on the basis of the Record, submissions by the parties, and new evidence.¹¹ Appeals to the RAD are party-driven and do not provide appellants an opportunity to have their claims heard *de novo*. The RAD's authority to hold hearings is limited to evidence that arose after the rejection of the

⁸ Subsection 110(1) of the *Act*.

⁹ Section 107 of the *Act*.

¹⁰ Section 170 of the *Act*.

¹¹ Subsection 110(3) of the *Act*.

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.¹² Hearings are also limited to only specific issues (serious credibility issues) which are directed by the RAD.¹³

[28] Given that the RPD has held a hearing on the totality of the evidence and given that the RPD has heard from the appellant directly at a hearing, the RPD is in the best position to assess the credibility of the appellant and to make findings on issues of fact related to the claim. This position is consistent with *Newton* at paragraph 82 where it indicates:

The [Refugee Appeal Division] is not a tribunal of first instance, and cannot simply ignore the proceedings before the presiding officer and the conclusions reached by him.¹⁴

[29] *Newton* concludes 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 [Refugee Appeal Division] should not interfere”.¹⁵ *Newton* adopts the definition of “reasonableness” in *Dunsmuir*. Reasonableness is concerned mostly with the existence of justification, transparency and intelligibility within the decision-making process of the RPD; and that the RPD decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law.¹⁶

[30] For the reasons outlined above, the RAD has afforded a considerable level of deference to RPD findings on questions of fact in this claim and will consider whether the findings of fact raised in this appeal meet the reasonableness test.

Analysis of the Merits of the Appeal

[31] I will now turn to the specific submissions by the appellant as to errors allegedly made by the RPD.

¹² Subsection 110(4) of the *Act*.

¹³ *Refugee Appeal Division Rules* (the “*Rules*”), SOR/2012-257; *Rule 57*.

¹⁴ *Newton v. Criminal Trial Lawyers’ Association*, 2010 ABCA 399, para. 82.

¹⁵ *Newton, ibid*, at para. 95.

¹⁶ *Dunsmuir v. New Brunswick*, 2008 SCC 9, at para. 47.

[32] Counsel submits that the non-governmental organization (NGO) office's support letter (page 96 of the Appellant's Record) was accompanied by a medical/dental verification from Dr. XXXX XXXX (dentist) on page 99 of the Appellant's Record stating that he treated her XXXX XXXX XXXX XXXX XXXX XXXX XXXX XXXX XXXX as a result of trauma to her. In his reasons, the RPD Member referred to the lack of outside corroboration from the NGO of the appellant's allegations that she would have reported to them. Counsel submits that the dentist's letter provides such outside corroboration.

[33] I note from the NGO's letter that they refer to incidents that happened to the appellant in XXXX 2010 while the dentist's letter refers to treatment due to trauma that was performed in XXXX 2010. It is therefore unclear that there is any link to the alleged abuse reported by the appellant to the NGO and the dental work she required. The RPD Member in his reasons stated that the credibility issues he identified in his reasons outweighed the evidentiary value of both the general country condition documents and the support letter provided by the NGO. Based on the totality of the evidence, I find this conclusion to be reasonable.

[34] Counsel submits that the second document provided by the appellant verified the conviction and sentence of her common-law husband. The report from the Republic of Colombia Supreme Judicial Council (pages 101-106 of the Appellant's Record) allegedly verifies that her common law husband, XXXX XXXX XXXX was convicted and his legal proceedings were handled by the "Specialized Prosecutor's office, anti-extortion and kidnapping unit, sixth chamber second criminal court specialized Bogota Circuit Supreme Court of Justice Bogota".

[35] However, I note that the report indicates that the offence of her ex-common law husband was in relation to "Violation Law 30 of 1986", that he received a conditional suspension of sentence and that the "Type of Process" was "against public health". There is no indication in this document that he had been charged with extortion or had been sentenced to any prison time. The appellant has not provided any documentation as to what constitutes an offence under law 30 of 1986. I note that item 7.1 of the country documents in the Immigration and Refugee Board's National Documentation Package for Colombia refers to 1986 legislation referred to as

the "National Statute on Drugs" intended to prosecute drug-related illegal conduct.¹⁷ While it is unclear if the ex-common law husband's offence was related to this law, the imposition of a suspended sentence does not indicate a serious crime had been committed. This document also does not support key elements of the appellant's story if her ex-common-law husband had not in fact been imprisoned. The transcript provided in pages 6-45 of the Appellant's Record indicates there was no examination by the RDP Member or counsel for the appellant about this document. While this document was not referred to in the RPD decision, it does not mean that the RPD Member ignored it as a simple review of its contents indicates it fails to support the appellant's allegations.

[36] In summary and based on the totality of the evidence, I find that the RPD Member's credibility findings were reasonable. The RPD Member has not misstated the evidence in coming to his credibility findings. Having considered all the evidence, I find that these reasons do fall within a range of possible, acceptable outcomes which are defensible in respect of the facts and law.

REMEDY

[37] For all these reasons, I confirm the determination of the RPD, namely, that XXXX XXXX XXXX XXXX is neither a Convention refugee nor a person in need of protection. This appeal is therefore dismissed.

(signed)

"Douglas Fortney"

Douglas Fortney

January 8, 2014

Date

¹⁷ Exhibit 4, National Documentation Package, Columbia, May 3, 2013, Item 7.1 *Colombia. International Narcotics Control Strategy Report 2013*. Vol. 1 United States. Department of State. March 1, 2013.