Immigration and
Refugee Board of Canada

Refugee Appeal Division

Commission de l'immigration
et du statut de réfugié du Canada

Section d'appel des réfugiés

RAD File No. / N° de dossier de la SAR : MB3-04986

Private Proceeding / Huis clos

Reasons and decision – Motifs et décision

Person who is the subject of the appeal	XXXX XXXXX XXXXX	**Personne en cause**
Appeal considered / heard at	Montréal, Quebec	**Appel instruit à**
Date of Decision	February 26, 2014	**Date de la décision**
Panel	M[e] Alain Bissonnette	**Tribunal**
Counsel for the person who is the subject of the appeal	M[e] Marie-José Blain	**Conseil de la personne en cause**
Designated Representative	N/A	**Représentant désigné**
Counsel for the Minister	N/A	**Conseil du ministre**

Canada

REASONS AND DECISION

I. INTRODUCTION

[1] **XXXXX XXXXX XXXXX**, the appellant, a citizen of India, is appealing against a decision of the Refugee Protection Division (RPD), alleging that it rendered an unreasonable decision with respect to his lack of credibility and to the outright rejection of his story.

II. DETERMINATION OF THE APPEAL

[2] Under subsection 111(1) of the *Immigration and Refugee Protection Act* (IRPA), the Refugee Appeal Division (RAD) allows the appeal, sets aside the RPD's determination and refers the matter to a differently constituted panel for a re-determination that takes into account all the evidence.

III. BACKGROUND

A. Basis of the claim

[3] In his Basis of Claim Form (BOC Form), which he signed on July 18, 2013, the appellant stated that he is a citizen of India, born on **XXXXX**, 19XX, and that his father, mother and two sisters were living in India at that time.[1]

[4] The appellant stated in his BOC Form that, if he were to return to his country, India, he would fear for his life given that members of the family of a young woman with whom he had had a romantic relationship, without this family's consent, blamed him for her death, wanted to kill him and had targeted his own family. He also stated that members of the family of this young woman, who is now deceased, had bribed police officers, who were also looking for him; they suspected

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[1] Basis of Claim Form (BOC Form), pages 11, 16 and 19 of the RPD record.

that he was responsible for the death of this young woman, they could lay false charges against him, and they had also started showing up at his home to arrest him.[2]

[5] The appellant stated in his BOC Form that he left his country on **XXXXX**, 2013, not before, not after, because his family, who thought that he should leave India to save his life, contacted an agent who made it possible for him to arrive in Canada that same day.[3]

B. RPD decision

[6] The hearing before the RPD was held on November 27, 2013. In its decision dated December 9, 2013, the RPD rejected the claim for refugee protection filed by the appellant, then referred to as the claimant, pointing out that his testimony was vague, non-specific and laborious,[4] and after identifying some credibility issues,[5] its finding in this regard is as follows:

> [translation]
>
> [17] Although the credibility issues mentioned above, when considered individually, may not be sufficient to reject a claim for refugee status or for protection as a person in need of protection and may, on their own, receive the benefit of the doubt, when examined as a whole, they undermine the claimant's credibility to the point that the panel does not believe the claimant's allegations in support of his claim.[6]

C. Ground of appeal and remedy sought

[7] In his memorandum, the appellant listed a single ground of appeal, that is, that the RPD's general finding that there was a lack of credibility and its subsequent outright rejection of his story are unreasonable.[7]

[8] The appellant is asking the RAD to set aside the RPD's decision and grant him refugee status.[8]

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2 *Idem*, page 21 of the RPD record.

3 *Idem*, pages 13 and 21 of the RPD record.

4 RPD decision, paragraph 9, page 5 of the RPD record.

5 *Idem*, paragraphs 10 to 16, pages 5 to 8 of the RPD record.

6 *Idem*, page 8 of the RPD record.

7 Appellant's memorandum, pages 13 to 15 of the appeal record.

IV. HEARING BEFORE THE RAD

A. No new evidence was presented by the appellant on appeal

[9] The appellant did not state in his affidavit or in his memorandum that he was presenting any new evidence as set out in subsection 110(4) of the IRPA.[9]

B. Subsection 110(6) test

[10] Pursuant to subsection 110(6) of the Act, when evidence presented on appeal is found to be admissible, it should be determined whether it raises a serious issue with respect to the credibility of the person who is the subject of the appeal, whether it is central to the decision with respect to the refugee protection claim and whether it justifies allowing or rejecting the refugee protection claim. If the answer is affirmative, the RAD may then hold a hearing.

110. (6) The Refugee Appeal Division may hold a hearing if, in its opinion, there is documentary evidence referred to in subsection (3)	110. (6) La section peut tenir une audience si elle estime qu'il existe des éléments de preuve documentaire visés au paragraphe (3) qui, à la fois :
(*a*) that raises a serious issue with respect to the credibility of the person who is the subject of the appeal;	a) soulèvent une question importante en ce qui concerne la crédibilité de la personne en cause;
(*b*) that is central to the decision with respect to the refugee protection claim; and	b) sont essentiels pour la prise de la décision relative à la demande d'asile;
(*c*) that, if accepted, would justify allowing or rejecting the refugee protection claim.	c) à supposer qu'ils soient admis, justifieraient que la demande d'asile soit accordée ou refusée, selon le cas.

C. No RAD hearing should be held

[11] In his memorandum, the appellant asks the RAD either to obtain a written transcript or listen to the recording of the hearing before the RPD, or to summon him for another hearing, referring to the fact that his credibility was the reason for the RPD's rejection.[10]

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8 *Idem*, page 15 of the appeal record.

9 Appellant's affidavit, pages 9, 10 and 11 of the appeal record.

Appellant's memorandum, pages 13 to 15 of the appeal record.

10 Appellant's memorandum, page 13 of the appeal record.

[12] In the case of this appeal, the appellant did not present any new evidence pursuant to the requirements of subsection 110(4) of the IRPA. Consequently, no hearing should be held.

V. WHAT DEFERENCE AND WHAT STANDARDS OF REVIEW SHOULD BE APPLIED IN THE APPEAL PROCEEDINGS BEFORE THE RAD?

[13] In the following paragraphs, I will analyze the particular context of the RPD and the RAD, and what I consider can be inferred from a few legal decisions that deal with these issues.

A. The particular context of the RPD and the RAD

[14] The RAD is not a court of law, and it does not review RPD decisions, but rather determines appeals in an administrative and non-judicial context. The RPD and the RAD are two separate divisions of the same Immigration and Refugee Board.[11] Sections 162 to 169 of the IRPA identify the provisions that apply to them both. Each division "has, 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."[12] Each member has the powers and authority of a commissioner and may do any other thing they consider necessary to provide a full and proper hearing.[13] Hearings are held in the absence of the public, although each may conduct a proceeding in public, or take any other measure that it considers necessary to ensure the appropriate access to the proceedings.[14] Sections 169.1 to 170.2 of the IRPA identify the provisions specific to the RPD, while sections 171 to 171.1 identify the provisions specific to the RAD.

[15] The RPD and the RAD, in their respective roles, are required to deal with whether to grant refugee status and protection to claimants. They are therefore part of the Canadian refugee protection system under the Act that governs them both and that, among other things, has the objective of establishing fair and efficient procedures that will maintain the integrity of this system,

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11 Section 151 of the IRPA: "The Immigration and Refugee Board consists of the Refugee Protection Division, the Refugee Appeal Division, the Immigration Division and the Immigration Appeal Division."

12 Section 162 of the IRPA.

13 Section 165 of the IRPA.

14 Section 166 of the IRPA.

while upholding Canada's respect for the human rights and fundamental freedoms of all human beings.[15]

[16] The primary role of the RPD is to hold hearings to determine whether refugee protection claimants are "Convention refugees" or "persons in need of protection." Because it disposes of the refugee protection claim at a hearing, the RPD therefore has the opportunity to see and question the refugee protection claimants, which gives it a significant advantage with respect to findings of fact and the assessment of the refugee protection claimants' credibility.

[17] Pursuant to subsection 110(1) of the IRPA, a person or the Minister may appeal—on a question of law, of fact or of mixed law and fact—to the RAD against a decision of the RPD to allow or reject the person's claim for refugee protection. Pursuant to subsection 110(3) of the IRPA, the RAD generally proceeds without a hearing, on the basis of the RPD record. For a hearing to be held before the RAD, there must be new evidence that has been found to be admissible. The RAD must also consider that this evidence raises a serious issue with respect to the credibility of the person who is the subject of the appeal, is central to the decision with respect to the refugee protection claim and would justify either allowing or rejecting the refugee protection claim.[16] Consequently, there are significant differences between the RPD and the RAD.

B. Right to appeal and deference to RPD decisions

[18] I would now like to refer to the concepts developed by the Alberta Court of Appeal in two decisions that do not directly relate to the Act governing the RPD and the RAD and that, consequently, do not serve as precedents that must be followed in this context. However, I am of the opinion that they can be used to provide a number of lessons not only regarding the issue of whether the appeal to the RAD is an appeal *de novo*, but also regarding what standards of review should be applied in this appeal.

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15 Paragraph 3(2)(*e*) of the IRPA.

16 Subsection 110(6) of the IRPA.

[19] When analyzing the respective roles of two administrative tribunals and deciding which standard of review the Law Enforcement Review Board should apply in determining an appeal against a decision made by the officer tasked with hearing a complaint regarding the behaviour of a police officer, the Alberta Court of Appeal noted that the mere presence of a right of appeal—including appeals within an administrative structure—in no way means that no deference to the first-level decision-maker is called for.[17]

[20] In its decision, the Court of Appeal referred to the example of the relationship established between a trial judge and an appeal judge:

> The presumption underlying the structure of our court system is that a trial judge is competent to decide the case before him or her, and that a just and fair outcome will result from the trial process. Frequent and unlimited appeals would undermine this presumption and weaken public confidence in the trial process. An appeal is the exception rather than the rule.[18]

[21] In thus citing the Supreme Court of Canada, the Court of Appeal underscored the importance of promoting the autonomy of the proceeding and its integrity, adding that the same principle applies within administrative structures:

> The same principle applies to the hearings before the presiding officers. If the Board was to continue to routinely rehear all matters on a *de novo* basis, and to extend no deference whatsoever to the decisions of the presiding officers, that would only undermine the apparent integrity of those hearings. As previously stated, that is inconsistent with the hybrid scheme of the *Act*. As the appellant noted, that approach undermines those hearings to the point that they become almost academic, and call into question the need of the interested parties to even participate in them. The hearing would be reduced to a type of preliminary inquiry.[19]

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17 *Newton v. Criminal Trial Lawyers' Association*, 2010 ABCA 399, paragraphs 55 and 56:

> [55] …While *H.L.* was decided on the *Housen* principles, and *Khosa* was decided on the *Dunsmuir/Pushpanathan* principles, both cases clearly reject the argument that the mere presence of a right of appeal signals that no deference is called for. There is no principle basis on which to make an exception for appeals within an administrative structure, such as the one that is in issue in this appeal.
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> [56] The mere presence of a right of appeal from the presiding officer to the Board does not warrant a correctness standard of review.

18 *Housen v. Nikolaisen*, 2002 SCC 33; [2002] 2 S.C.R. 235, paragraph 17, as cited by the Alberta Court of Appeal in *Newton* at paragraph 81.

19 *Newton v. Criminal Trial Lawyers' Association*, 2010 ABCA 399, paragraph 81.

[22] Having examined the respective roles of the decision-makers, their particular expertise and the general economy of the proceedings, the Alberta Court of Appeal identified which standards of review the Law Enforcement Review Board should apply to the decision rendered by the decision-maker of first instance:

> [82] In conclusion, the decision of the Board to conduct a *de novo* hearing, and to assume that it owed no deference to the findings of the presiding officer was in error. The role of the Board is primarily to sit on appeal from the presiding officer. The Board is not a tribunal of first instance, and cannot simply ignore the proceedings before the presiding officer, and the conclusions reached by him. The focus of the appeal to the Board should be on its dual mandate of civilian oversight, and the correction of unreasonable results.
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> [83] There is no general power to hold a *de novo* hearing in every case, and no requirement that a *de novo* hearing be held unless the parties consent to proceeding otherwise. Where a sufficient reason is shown or the issues on appeal warrant it, the Board has the power to admit fresh evidence. When sufficient cause is shown the Board can even rehear key evidence presented to the presiding officer.
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> [84] The Board has a legitimate role to play in providing civilian oversight to the system of police discipline where oversight issues arise. The Board is not bound by the inferences and conclusions of the presiding officer, but it should be able to offer some articulable reason based in law, fact or policy when it interferes with a decision under appeal. The Board should proceed primarily from the record created by the hearing before the presiding officer. It should extend deference to the decision of the presiding officer on questions of fact, credibility, and technical policing issues. If the decision of the presiding officer was reasonable, the Board should not substitute its own view just because it might have come to a different conclusion. Where the appeal raises issues of acceptability of particular police conduct, or the integrity of the discipline process, the Board's mandate is more robust.[20]

[23] In another decision by the same Alberta Court of Appeal, the Honourable Justice Slatter indicated that the *Newton* standard of review may well vary depend on the issue at hand. Referring to the Métis Settlements Appeal Tribunal, Justice Slatter pointed out that the administrative tribunal plays a number of roles, including promoting consistency in the interpretation and application of the statutory regime to all Métis throughout Alberta. In the future, if an appeal were to raise issues of this type, according to Justice Slatter, the Appeal Tribunal owes less deference to a decision made at the local level.[21]

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20 *Idem*, paragraphs 82 to 84.

21 *Kikino Métis Settlement v. Métis Settlements Appeal Tribunal*, 2013 ABCA 151, paragraph 12:

[24] In some interesting decisions of the Court of Appeal of Québec, this same issue of standards of review to be used by an appellate body that is part of an administrative tribunal was analyzed, but in a legislative context that differs from ours. I note from these two decisions that it is essential that [translation] "the applicable legislation be reviewed carefully to determine the limits of the intervention framework that each decision-maker, at each decision-making level, has been assigned by Parliament."[22] I also note that, contrary to the statutory scheme analyzed in this case, which provides that the appellate body hearing the appeal can uphold, amend or reverse any decision brought before it,[23] in the context of the IRPA, which governs the RPD and the RAD, as I understand it, the RAD can set aside only RPD decisions that are wrong.[24] Finally, I am sensitive to the argument that an appeal before an appellate body that is part of an administrative tribunal must not be treated like a kind of judicial review.[25] However, I also note that even an appeal like this has intrinsic limits and that this may not be the time for a new process.[26]

[25] When all is said and done, I am of the opinion that, except for strict issues of law that may include, in particular, the interpretation of the IRPA, which governs the RPD and the RAD, and except for issues of natural justice, it is appropriate for us, as members of the RAD, to extend deference to RPD decisions, which is different but comparable to that which courts of law are required to extend to decision-makers of first instance when the issue is a question of fact or a

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> "This *Newton* standard of review may well vary depending on the issue at hand. The Appeal Tribunal is charged with preserving and enhancing Métis culture and identity and furthering the attainment of self-governance by Métis settlements under the laws of Alberta: *Métis Settlements Act*, RSA 2000, c. M-14, s. 0.1. It undoubtedly plays other roles, including, for example, promoting consistency in the interpretation and application of the statutory regime throughout Alberta. To the extent that an appeal raises issues of this type, the Appeal Tribunal owes less deference to the settlement council. The settlement council, on the other hand, is charged with the local management of the Métis settlement, and with having regards to local interests and issues. On those issues, as well as on its basic findings of fact, more deference is due."

22 *Laliberté v. Huneault*, 2006 QCCA 929, paragraph 16.

23 *Idem*, paragraph 18.

Parizeau v. Barreau du Québec, 2011 QCCA 1498, paragraph 76.

24 Paragraph 111(2)(*a*) of the IRPA.

25 *Parizeau v. Barreau du Québec*, 2011 QCCA 1498, paragraphs 75 to 78.

26 *Idem*, paragraph 79.

question of mixed law and fact. Therefore, in my opinion, an appeal heard by the RAD does not constitute an appeal *de novo*.

[26] That said, the Federal Court should soon clarify for us the issue of what standards of review should apply in the case of appeals of RPD decisions heard by the RAD. When this happens, we will no longer have to make these kinds of references to our current context or to decisions made in cases concerning legislation that differs from the legislation governing the relationship between the RPD and the RAD. However, for the moment, I am of the opinion that it is necessary to do as I have done in the paragraphs above, well aware of the fact that this situation is temporary and that the analysis of the standard of review does not have to be done in all cases.[27]

C. Standard of review to be applied in this case

[27] In his memorandum, the appellant gives only one ground of appeal, namely, that the general finding that there was a lack of credibility and the subsequent outright rejection of his story by the RPD were unreasonable.[28]

[28] The assessment of the appellant's credibility is a question of fact and, consequently, the standard of review in this appeal is reasonableness.[29] When a decision is reviewed on the standard of reasonableness, the analysis must relate to the justification, transparency and intelligibility within the decision-making process, as well as to whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law.[30]

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27 *Dunsmuir v. New Brunswick*, 2008 SCC 9; [2008] 1 S.C.R. 190, paragraph 62. *Canada (Human Rights Commission) v. Canada (Attorney General)*, 2011 SCC 53; [2011] 3 S.C.R. 471, paragraph 16.

Cetinkaya v. Canada (Minister of Citizenship and Immigration), No. IMM-3362-11, Russell, January 4, 2012; 2012 FC 8, paragraph 16.

28 Appellant's memorandum, pages 13 to 15 of the appeal record.

29 *Parthipan Balasubramaniam v. Canada (Minister of Citizenship and Immigration)*, No. IMM-4243-12, Scott, June 21, 2013; 2013 FC 698, at paragraph 23.

30 *Dunsmuir v. New Brunswick*, 2008 SCC 9; [2008] 1 S.C.R. 190, at paragraph 47. *Gabor Miroslav v. Canada (Minister of Citizenship and Immigration)*, No. IMM-3466-09, Russell, April 12, 2010; 2010 FC 383, at paragraph 22. *Bethany Lanae Smith v. Canada (Minister of Citizenship and Immigration)*, No. IMM-5699-11, Mosley, November 2, 2012; 2012 FC 1283, at paragraph 19.

VI. ANALYSIS OF THE MERITS OF THE APPEAL

Did the RPD err in its assessment of the appellant's credibility?

[29] I conclude that the RPD made an unreasonable error in its assessment of the appellant's credibility when it drew an unjustified inference without analyzing the basic characteristics of his claim for refugee protection, and that its decision in this regard does not fall within a range of possible, acceptable outcomes which are defensible in respect of the facts and law. Here is why.

[30] In his memorandum, the appellant criticizes the RPD for preparing reasons that were hardly convincing, and even laconic. He argues that the main reason for the RPD's rejecting his claim for refugee protection was his difficulty remembering the dates of certain events. He added that, in reading the RPD's reasons for decision, it is impossible to know exactly how his claim for refugee protection was not credible or plausible. He argues that it is possible to have difficulty remembering the dates of certain events and still be considered credible.[31]

[31] In his memorandum, the appellant criticizes the RPD for dwelling on the same secondary or accessory issues in order to support its finding that there was a lack of credibility without assessing all his testimony or, in other words, without assessing the credibility of the evidence at the very heart of his claim for refugee protection.[32]

[32] In its reasons for decision, the RPD indicates that the appellant's testimony was vague, non-specific and laborious,[33] and it identifies some credibility issues. First, there was an issue regarding the dates when the appellant allegedly saw the young woman with whom she had had a romantic relationship, XXXX XXXXX, again.[34] Then, there was an issue involving the moment he allegedly decided to leave his country.[35] There was also an issue regarding who had informed him of the fact that henchmen associated with the family of the young woman were looking for him all

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31 Appellant's memorandum, page 14 of the appeal record.

32 *Idem*, page 15 of the appeal record.

33 RPD's decision, paragraph 9, page 5 of the RPD record.

34 *Idem*, paragraph 10, page 5 of the RPD record.

35 *Idem*, paragraphs 11 and 13, pages 5, 6 and 7 of the RPD record.

over the country, leading the RPD to conclude that the appellant wanted to exaggerate his story and that he was adjusting his testimony.[36] Lastly, there was an issue regarding the steps taken to be able to leave his country and, according to the RPD, his testimony in this regard was confusing and his explanations were not explanations.[37]

[33] The RPD wrote as follows regarding the credibility of the appellant's allegations:

> [translation]
>
> [17] Although the credibility issues mentioned above, when considered individually, may not be sufficient to reject a claim for refugee status or for protection as a person in need of protection and may, on their own, receive the benefit of the doubt, when examined as a whole, they undermine the claimant's credibility to the point that the panel does not believe the claimant's allegations in support of his claim. [38]

[34] In my opinion, my role in this appeal is not to re-weigh the evidence[39] or to conduct a microscopic analysis of the RPD decision, but rather to determine whether the RPD made errors and whether, when analyzed as a whole, the RPD's finding that the appellant's allegations are not credible falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law.[40] I want to point out that, according to Federal Court case law, the RPD's findings affecting issues of credibility and the assessment of the evidence are entitled to great deference in the context of judicial review.[41] I am of the opinion that the RAD must also show deference toward the RPD's findings affecting issues of credibility and the assessment of evidence in the context of this administrative appeal process.

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36 *Idem*, paragraph 12, page 6 of the RPD record.

37 *Idem*, paragraphs 14, 15 and 16, pages 7 and 8 of the RPD record.

38 *Idem*, page 8 of the RPD record.

39 *Canada (Minister of Citizenship and Immigration) v. Khosa*, 2009 SCC 12; [2009] 1 S.C.R. 339, paragraph 59: "Where the reasonableness standard applies, it requires deference. Reviewing courts cannot substitute their own appreciation of the appropriate solution, but must rather determine if the outcome falls within 'a range of possible, acceptable outcomes which are defensible in respect of the facts and law' (*Dunsmuir*, at para. 47). There might be more than one reasonable outcome. However, as long as the process and the outcome fit comfortably with the principles of justification, transparency and intelligibility, it is not open to a reviewing court to substitute its own view of a preferable outcome."

40 *Pawanbir Singh v. Canada (Minister of Citizenship and Immigration)*, No. IMM-12505-12, Shore, July 23, 2013; 2013 FC 807, at paragraph 29.

[35] As part of its demanding duties, the RPD must assess all the evidence presented before it. That being said, it is permissible to disbelieve the testimony of a refugee protection claimant. However, this must be stated unequivocally.[42] In other words, there is an obligation to give reasons, in clear and unmistakable terms, in support of a finding that a portion of testimony or evidence is not credible[43] after assessing the credibility of the refugee protection claimant while taking into account all the evidence and testimony, as well as the fact that the refugee protection claimant has made his or her various statements under oath.[44]

[36] In *Jamil*, the Federal Court concluded that the RPD's credibility findings with regard to the person who was the subject of the appeal were unjustifiable:

> [24] There is a well-recognized line of cases from the Federal Court of Appeal and this Court which has conveniently been summarized by Justice Martineau in *R.K.L* v. *Canada (Minister of Citizenship and Immigration)* 2003 FCT 116 that a Refugee Board must not be zealous to find an applicant not to be credible and "must not be over-vigilant in its microscopic examination of the evidence of persons who testify through interpreters and tell tales of horror in whose objective reality there is reason to believe." See the Federal Court of Appeal's decisions in *Attakora* v. *Canada (Minister of Employment and Immigration)* (1989) 99 N.R. 168, along with *Owusu-Ansah* v. *Canada (Minister of Employment and Immigration)* (1989) 98 N.R. 312 and *Frimpong* v. *(Canada Minister of Employment and Immigration)* (1989) 99 N.R. 168.
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> [25] These cases as applied by the Federal Court of Appeal itself and by this Court proscribe credibility findings arrived at by, for example:
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> > *Findings for which there was no evidence;
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> > *Findings of the tribunal based on conjecture, resulting in unjustified and unsupported inferences regarding the circumstances leading to an application for refugee status;
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> > *Inconsistencies drawn between POE notes and an applicant's testimony or the applicant's PIF where a tribunal dwells on details and not on the substance of the claim and leads to misconstruction of the evidence. Any such inconsistencies

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41 *Ahmadsai v. Canada (Minister of Citizenship and Immigration)*, No. IMM-893-13, Shore, October 10, 2013; 2013 FC 1025, at paragraph 23.

42 *Maksud v. Canada (Minister of Citizenship and Immigration)*, No. IMM-9459-03, Layden-Stevenson, February 10, 2005; 2005 FC 221, at paragraph 8.

43 *Moreno v. Canada*, [1994] 1 F.C. 298, 315 (F.C.A.).

44 *Ballesteros v. Canada (Minister of Citizenship and Immigration)*, No. IMM-3979-08, Lagacé, April 7, 2009; 2009 FC 352, at paragraph 22.

> should be major and not minor and sufficient by itself to call into question the applicant's credibility. (See *Mushtaq* v. *Canada (Minister of Citizenship and Immigration)* 2003 FC 1066; and
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> *The tribunal must be reasonable in rejecting an applicant's explanation when confronted with a contradiction and must not be quick to apply North American logic and reasoning to a claimant's behaviour, (see *R.K.L.*, *supra*, at para 12);
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> *The tribunal must assess the applicant's claim against the totality of the evidence.[45]

[37] After carefully reading the appellant's arguments and the RPD's reasons for decision, I am of the opinion that the RPD was over-vigilant in examining, in an overly rigorous manner, aspects that, in my opinion, are secondary in relation to the fundamental characteristics of the appellant's claim for refugee protection. In particular, I am referring to the dates when the appellant allegedly saw the young woman with whom he had had a romantic relationship again, to the moment he allegedly decided to leave his country, to who informed him of the fact that henchmen associated with the family of the young woman were looking for him all over his country and, finally, to the steps taken to be able to leave his country.

[38] Moreover, the RPD itself indicated in its reasons that none of these elements are determinative when considered individually and that, on their own, they may receive the benefit of the doubt. However, it added that, after analyzing these elements as a whole, it was of the opinion that they undermined the appellant's credibility to the point that it did not believe his allegations. That being said, no explanation is provided regarding the fact that, when considered individually, the elements analyzed are not determinative, but that, taken as a whole, they undermine the credibility of the appellant's allegations. This leads me to conclude that the RPD therefore proceeded with an unjustified inference, which means that its finding that the appellant's allegations are not credible is not explained in clear and unmistakable terms. In doing so, the RPD did not explain why, in its opinion, the appellant's alleged risk was established or not—a risk, that is, to his life by members of the family of the young woman with whom he had had a romantic relationship, without the consent of this family, as well as by police officers whom they had bribed.

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45 *Jamil v. Canada (Minister of Citizenship and Immigration)*, No. IMM-6643-05, Lemieux, June 21, 2006; 2006 FC 792, paragraphs 23 to 25.

In my opinion, this constitutes an unreasonable error. Taking this error into account, I find that the RPD's decision does not fall within a range of possible, acceptable outcomes which are defensible in respect of the facts and law.

[39] In this appeal, if I find that the RPD made an unreasonable error and that its decision regarding the credibility of the appellant's allegations does not fall within a range of possible, acceptable outcomes which are defensible in respect of the facts and law, this does not mean that I am personally able to substitute the determination that should have been made for the RPD's determination. In the case at hand, while the recording of the hearing with respect to the appellant's claim for refugee protection is part of the record before me, the fact remains that I cannot substitute my own determination for the determination made by the RPD without hearing the evidence that was presented before it. In addition, according to my understanding of the case law, the credibility of the person who is the subject of the appeal can be analyzed only at a hearing, and findings can be made in this regard only by a decision-maker who participated in this hearing and heard all the evidence.[46] Finally, I did not find in the RPD's decision any analysis regarding internal flight alternative (IFA) or state protection. These issues must be analyzed before concluding that the appellant has a well-founded fear of persecution or that it is more likely than not that he would face a personalized risk to his life if he had to return to live in his country.

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[46] *Singh v. Minister of Employment and Immigration*, [1985] 1 S.C.R. 177. On pages 213 and 214 of the written reasons by Justice Wilson:

> . . .[E]ven if hearings based on written submissions are consistent with the principles of fundamental justice for some purposes, they will not be satisfactory for all purposes. In particular, I am of the view that where a serious issue of credibility is involved, fundamental justice requires that credibility be determined on the basis of an oral hearing. Appellate courts are well aware of the inherent weakness of written transcripts where questions of credibility are at stake and thus are extremely loath to review the findings of tribunals which have had the benefit of hearing the testimony of witnesses in person: (citations omitted). I find it difficult to conceive of a situation in which compliance with fundamental justice could be achieved by a tribunal making significant findings of credibility solely on the basis of written submissions.

Killen v. Minister of Transport, T-2410-97, Gibson, June 8, 1999; 1999 CanLII 8354 (FC), at paragraph 14:

> I find that the only option available to the Tribunal in the circumstances was to evaluate the testimony given before the member of the Tribunal on the basis of the transcript of that testimony. In doing so, it is indeed unfortunate that it adopted the language of "credibility" with respect to the testimony of Mrs. Matheson. It was simply not in a position to determine credibility. That being said, I am satisfied that it was open to the Tribunal to evaluate the evidence on the basis of the transcript and in so doing to give greater weight to the

VII. REMEDIES

[40] For these reasons, I determine that the RPD's determination regarding the claim for refugee protection of XXXXX XXXXX XXXXX must be set aside.

[41] That being said, with regard to the determination that was set aside, I am of the opinion that I cannot substitute the determination that should have been made because, in particular, without a hearing, I am not permitted to assess the appellant's credibility, and because the RPD's decision did not analyze the issues of an IFA and state protection. Consequently, I am referring the matter to a differently constituted panel for a re-determination that takes into account all the evidence.

[42] The appeal is allowed.

Alain Bissonnette
M^e^ Alain Bissonnette

February 26, 2014
Date

IRB translation

Original language: French

specific and detailed testimony of Mrs. Matheson as against the necessarily more generalized testimony of the applicant and his student pilot.