



RAD File No. / N° de dossier de la SAR : VB3-02464

Private Proceeding / Huis clos

Reasons and decision – Motifs et décision

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| Person(s) who is(are) the subject of the appeal | XXXX XXXX XXXX | Personne(s) en cause |
| Appeal considered / heard at | In Chambers at Vancouver, BC | Appel instruit à |
| Date of decision | January 13, 2014 | Date de la décision |
| Panel | Douglas Fortney | Tribunal |
| Counsel for the person(s) who is(are) the subject of the appeal | N/A | 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 (the “appellant”), a citizen of the Philippines, appeals a decision of the Refugee Protection Division (the “RPD”) rejecting his 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 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 contracted with an employment agency in the Philippines in 2010 to obtain a work permit and employment in Canada. The appellant was led to believe that the fee for this service was \$3,500 Canadian and that this amount would include all of the associated costs. The appellant later learned that just prior to his departure that the cost of his flight was not included in the \$3,500 fee. The appellant was required to pay an additional \$1,400 to cover the cost of his travel to Canada. The appellant did not have the funds available to pay this amount. The appellant then borrowed 64,500 pesos from XXXX XXXX, XXXX XXXX XXXX XXXX, and XXXX XXXX XXXX XXXX. The appellant agreed to pay 25 percent interest on the loan and the repayment was to be made over a six-month period beginning in XXXX 2012.

[4] Once the appellant arrived in Canada he began to work for the employer that had hired him through the agency in the Philippines. The employer did not respect the terms of the appellant’s employment. The appellant left this employment after about three months.

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

[5] As a result of this, the appellant was unable to repay the loan to XXXX, XXXX, and XXXX. As a result, the lenders began threatening his family. They threatened to harm his wife and daughter if he did not reimburse the loan. They came to the appellant's home and made threats to his wife and confronted her in a market and pulled her hair, demanding that they get paid. The appellant attempted to get an extension on the repayment of the loan but the lenders refused.

[6] The appellant's wife has left the Philippines and is working as a XXXX in XXXX, and his daughter lives with his sister in XXXX. The appellant fears returning to the Philippines as he is unable to repay the loan and he believes that the lenders will harm him.

[7] The RPD heard the appellant's refugee protection claim on August 26, 2013. The RPD's reasons for the decision were delivered orally with written reasons and a Notice of Decision dated September 11, 2013.

[8] The appellant was self-represented for his RPD hearing as he is for this appeal.

[9] The RPD's written reasons dated September 11, 2013, stated that the appellant's case for refugee protection was rejected. The RPD Member found that there was no nexus to a Convention ground of refugee protection and that the determinative issues in this claim were internal flight alternative (IFA) and state protection.

Submissions

[10] The appellant's appeal Record has identified what he feels to be several factual errors in the RPD Member's reasons. I have reviewed the appellant's arguments as provided in the Appellant's Record and I find that the questions he has raised identify the following grounds for this appeal:

- Whether the RPD Member has made several factual errors in his reasons that may be central to his determination that the appellant is not a Convention refugee or person in need of protection; and

- Whether the RPD Member has erred in finding that the appellant has an IFA in XXXX.

[11] The appellant's submissions can be summarized as follows: 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.

[12] The appellant has not made any submissions as to the standard of review in this appeal.

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

Consideration of New Evidence

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

Application for an Oral Hearing

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

[16] 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.

[17] 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.

[18] 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.

[19] 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

[20] 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.

[21] In *Dunsmuir*,³ the Supreme Court of Canada (the “Supreme Court”) 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.

[22] I find that the issues raised in this appeal are those of fact in reference to the first ground of this appeal and issues of mixed law and fact in reference to the second ground of this appeal.

[23] In *Newton*,⁵ the Alberta Court of Appeal (the “Alberta Court”), having considered *Dunsmuir* and other jurisprudence, considered the standard of review to be applied by an

² Subsection 110(4) of the *Act*.

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.

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*.

[24] 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.

[25] 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.

[26] 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*.

⁶ *Ibid.*, at para. 44.

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

⁸ Subsection 110(1) of the *Act*.

[27] 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.

[28] 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 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

[29] 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

⁹ Section 107 of the *Act*.

¹⁰ Section 170 of the *Act*.

¹¹ Subsection 110(3) of the *Act*.

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.

[30] *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

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

Analysis of the Merits of the Appeal

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

[33] Turning to the first ground of appeal, the appellant submits that the RPD Member has made several factual errors in his reasons that may be central to his determination that the appellant is not a Convention refugee or person in need of protection.

[34] The first error identified by the appellant refers to line 5 on page 2 of the RPD reasons where the RPD Member stated that the appellant was required to pay an additional \$1,400 to cover the cost of his travel to Canada. The appellant submits this is an error as his Basis of Claim (BOC) states that he was asked an additional collection of \$1,600 later days for his plane ticket before his flight on XXXX XXXX, 2011. I note that there appears to be two BOC forms in the RPD Record (both dated February 25, 2013) that contain minor differences. The appellant’s references in this and other alleged factual errors appear to be referencing the second BOC.

¹⁵ *Newton, ibid*, at para. 95.

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

[35] I have also reviewed the audio CD of the hearing to review the appellant's testimony at the hearing. I note that at about 00:09:18 of the audio recording when the RPD Member asks questions as to the amounts owed by the appellant, the responses provided may have been confusing as references were provided at times in Philippine pesos and at other times in dollar equivalents. However, I find that if any error has been made by the RPD in referencing these additional amounts owe by the moneylenders to the appellant, such discrepancies were relatively minor and did not have any material impact upon the RPD Member's reasons.

[36] The second error identified by the appellant is that the RPD Member erred in his reasons on lines 7 to 9 on page 2 of his reasons when he stated that the appellant borrowed 64,500 pesos from XXXX XXXX,XXXX XXXX XXXX XXXX and XXXX XXXX XXXX XXXX, agreeing to pay 25 percent interest on the loan and the repayment was to be made over a six months period beginning in XXXX 2012. The appellant submits that in his BOC he clearly stated that he provided the said amount of money with his wife XXXX XXXX XXXX as a co-maker for his entire placement fee in which he had borrowed from different persons namely XXXX XXXX XXXX XXXX (\$1,500), XXXX XXXX (\$1,500) and XXXX XXXX XXXX XXXX (\$1,500) and the rest he borrowed from his friends and relatives. While the appellant's reference to the second BOC narrative appears to be correct, I note that a review of the audio recording indicates that when the RPD Member asks questions as to the amounts owed by the appellant, the responses provided by the appellant identify the three referenced moneylenders but not friends and relatives. Once again, I find that if any error has been made by the RPD in referencing who are the moneylenders to the appellant or the timing of repayments, such discrepancies were relatively minor and did not have any material impact upon the RPD Member's reasons.

[37] The third error identified by the appellant is that the RPD Member erred in his reasons on lines 11 to 13 on page 2 of his reasons when he stated that, after the appellant arrived in Canada, he began to work for the employer that hired him through the agency in the Philippines and that the appellant left his employer after four months as the employer did not respect the terms of his employment. The appellant submits that in his BOC he clearly stated that his work lasted only for three months with that employer from XXXX to XXXX 2011. Once again, the appellant's

appears to be referring to the second BOC narrative and his statement appears to be correct. A review of the audio recording does not indicate that details of his employment in Canada had been canvassed. Once again, I find that if any error has been made by the RPD in referencing the timing of his employment in Canada, such discrepancies were relatively minor and did not have any material impact upon the RPD Member's reasons.

[38] The fourth error identified by the appellant is that the RPD Member erred in finding that that he may have been embellishing his story when he testified at the hearing that he believes the moneylenders may have connections to the police. The appellant submits that this matter was "already in his mind" when preparing his BOC but as he had no evidence he had not exposed what he believes is happening in his country. The country documents for the Philippines do confirm that corruption is a serious problem in that country. However, the appellant has not provided any evidence including in his testimony of why he believes the money lenders have any connections to the police. I find the RPD Member's conclusion to be reasonable that the appellant may have been embellishing his claim in claiming that the money lenders have any connections to the police.

[39] The fifth error identified by the appellant is that the RPD Member erred in its reference to his unsuccessful efforts to obtain compensation from his former employer in Canada. The RPD Member in his reasons states the appellant has not been paid the amounts owed to him under the Ontario Labour Board ruling. The appellant states that in his second BOC that the employer appealed this ruling and as the appellant could not attend the hearing his settlement has been quashed. Once again, the problem here may have been that the RPD Member was not referencing the second BOC that appears in the Appellant's Record.

[40] While the appellant's experience in Canada has been difficult, unfortunately this does not have any direct bearing on his refugee protection claim against the Philippines. The moneylenders he fears are located in the Philippines and appear to have no links to Canada. I find that if any error has been made by the RPD in referencing the efforts of the appellant to obtain compensation from his former employer in Canada, such discrepancies were relatively minor and did not have any material impact upon the RPD Member's reasons.

[41] The RPD Member found the appellant to be credible except that he may be embellishing his story when he testified at the hearing that he believes the moneylenders may have connections to the police. Having accepted the basic details of the appellant's allegations to the risks he faces in the Philippines, the RPD Member found that the determinative factors in the appellant's claim were state protection and IFA. I find to be reasonable the RPD Member's conclusion that the appellant had not rebutted the presumption of state protection in the Philippines given that he has not taken any steps to approach the authorities to report the threats he has experienced from the moneylenders or to report his concerns that the loans may be illegal given the exorbitant rate of interest the appellant was required to pay.

[42] In the appellant's final submission, addresses his submission that he does not have an IFA in XXXX.

[43] The key concepts concerning IFA come from two cases: *Rasaratnam*¹⁷ and *Thirunavukkarasu*.¹⁸ For these cases it is clear that the test to be applied in determining whether there is an IFA is two pronged:

... the Board must be satisfied on a balance of probabilities that there is no serious possibility of the claimant being persecuted [or that he or she faces a danger of torture or a risk to life or cruel and unusual treatment or punishment] in the part of the country to which it defines an IFA exists.¹⁹

Moreover conditions in the part the country considered to be an IFA must be such that it would not be unreasonable, in all the circumstances including those particular to the claimant, for him to seek refuge there.²⁰

[44] Both prongs must be satisfied for a finding that the claimant has an IFA. The onus is on the refugee claimant to show that he or she does not have an IFA.

[45] In his submission relating to IFA, the appellant refers to the RPD Member's statement that, as his wife did not receive any threats while she was living in XXXX from XXXX to XXXX 2013, the moneylenders were unable to locate her there. The appellant submits that

¹⁷ *Rasaratnam v. Canada (Minister of Employment and Immigration)*, [1992] 1 FC 706 (FCA).

¹⁸ *Thirunavukkarasu v. Canada (Minister of Employment and Immigration)*, [1994] 1 FC 589 (FCA).

¹⁹ *Rasaratnam*, *supra*, footnote 1 at 710.

²⁰ *Ibid*, at 709 and 711.

during this time she was in hiding in accommodations provided by the agency that hired her to work in XXXX and that at any rate it is too short a time frame to conclude that the moneylenders were unable to locate her in XXXX. The appellant submits that the RPD Member erred in finding that he has a reasonable IFA in XXXX.

[46] In reference to the first prong of the IFA test, the RPD Member found to be speculative the appellant's fear that the moneylenders would locate him in XXXX or that the moneylenders had any connections to police in XXXX.

[47] A review of the audio recording does not indicate that the appellant testified his wife was "in hiding" while in XXXX. The RPD Member found that the fact that the moneylenders were unable to find the appellant's wife while she was in XXXX for four months is a strong indication that the lenders do not have the contacts or connections and the ability to locate the appellant in XXXX. I find that given the moneylenders' actions against his wife before she relocated to XXXX, it would be reasonable to expect that they would continue efforts to locate her. No evidence was provided in the appellant's BOC or testimony at the hearing that the moneylenders were trying to locate her.

[48] I also note that the RPD Member did ask the appellant how the money lenders could find him in XXXX. The appellant could not identify any specific method by which the moneylenders could find him. The RPD Member found there was insufficient credible and trustworthy evidence to establish that the moneylenders have the ability to find the appellant in XXXX. Based on the evidence, I find the RPD Member's conclusion as to the first prong of the IFA test to be reasonable. As to the second prong of the IFA test, the appellant has not raised any issue regarding the RPD Member's finding that it was not unreasonable for him to relocate to XXXX. In summary, I find to be reasonable the RPD Member's conclusion that the appellant has an IFA in XXXX.

[49] In summary and based on the totality of the evidence, I find to be reasonable the RPD Member's findings that the appellant has an IFA in XXXX and that he had not successfully rebutted the presumption of state protection in the Philippines. 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

[50] For all these reasons, I confirm the determination of the RPD, namely, that 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 13, 2014
Date