



RAD File No. / N° de dossier de la SAR : VB3-02152

Private Proceeding / Huis clos

Reasons and decision – Motifs et décision

**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 3, 2014

Date de la décision

Panel

Douglas Fortney

Tribunal

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

Benjamin Allison

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

Designated representative

N/A

Représentant(e) désigné(e)

Counsel for the Minister

Michael Scott

Conseil du ministre

REASONS FOR DECISION

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

DETERMINATION OF THE APPEAL

[2] Pursuant to subsection 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 Claimant fears return to Nigeria because he alleges that his father is a XXXX XXXX XXXX XXXX XXXX XXXX XXXX and his father and others from the church have persecuted him because of his sexual orientation and he faces imprisonment as a homosexual man in Nigeria. The Claimant left Nigeria on XXXX XXXX XXXX 2013, arrived in Canada on XXXX XXXX XXXX 2013 in Toronto and made a refugee claim on April 12, 2013 inland in Winnipeg.

[4] The RPD heard the appellant’s refugee protection claim on July 3 and August 9, 2013. The RPD’s written reasons and Notice of Decision are dated August 21, 2013.

[5] The appellant was represented for his RPD hearing by the same counsel as for this appeal.

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

[6] The RPD's written reasons dated August 21, 2013 stated that the appellant's case for refugee protection was rejected. The determinative issues in this claim were identity, whether the claimant is who he alleges he is, and credibility, particularly regarding the claimant's alleged sexual orientation as a nexus to a Convention ground.

Submissions

[7] The appellant's submissions identify the following grounds for this appeal:

- **Issue 1:** Whether the Presiding Member failed to observe a principle of natural justice or otherwise acted beyond her powers because the Member demonstrated a pervasive sense of skepticism at the hearing by ignoring material evidence and sworn declaration by the applicant.
- **Issue 2:** Whether the Panel based its decision on an erroneous finding of fact and made its decision in a perverse or capricious manner without regard to the material before it.
- **Issue 3:** Whether the Panel breached the principles of procedural fairness when it relied heavily on the alleged asylum claim entries by the UK border services as evidence of the appellant's lack of credibility without giving the appellant an opportunity to introduce evidence that he did not actually make an asylum claim in the UK.

[8] 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.

[9] Counsel for the appellant has submitted that the standard of review in this appeal should be correctness for issues of natural justice or procedural fairness and reasonableness for issues of fact.

[10] The Minister has intervened in this appeal. In the Minister's notice of intervention received by the RAD on October 15, 2013, Minister's counsel stated their intent to submit an intervention Record within 30 days. To date, no further communication was received by RAD from Minister's counsel.

Consideration of New Evidence

[11] In the appellant's Record received on October 9, 2013, the appellant's affidavit stated the appellant's intent to submit an application to consider late evidence. The late evidence would be composed of the appellant's UK immigration documents in order to document his assertion that he had not filed for asylum in the UK. In his affidavit, the appellant stated that he expected to receive these documents by November 7, 2013. To date, no further communication was received by RAD from the appellant or his counsel on this matter.

[12] No other documents have been received as new evidence from the appellant. Consideration of this appeal will proceed on the basis of the appellant's Record received on October 9, 2013 as well as the RPD tribunal record.

Application for an Oral Hearing

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

[14] 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.

[15] 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.

[16] 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.

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

Standard of Review

[18] 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.

[19] 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.

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.

[20] Counsel has submitted that issues 1 and 3 identified earlier in these reasons involve issues of procedural fairness. To the extent that these issues do engage questions of procedural fairness, they are reviewable on the correctness standard.⁵ However, I also find that how counsel has framed issues 1 and 3 may also involve questions of fact. I find that issue 2 involves questions of fact. In my analysis, elements of the issues raised by counsel that engage issues of procedural fairness will be reviewed on a standard of correctness while elements of these issues that involve issues of fact will be reviewed on a standard of reasonableness.

[21] In *Newton*,⁶ 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*.

[22] The *Newton*⁷ 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*.⁸ 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.

⁵ *Canadian Union of Public Employees (CUPE) v Ontario (Minister of Labour)*, 2003 SCC 29 at para 100; *Sketchley v Canada (Attorney General)*, 2005 FCA 404 at para 54.

⁶ *Newton v. Criminal Trial Lawyers' Association*, 2010 ABCA 399, at para 43.

⁷ *Newton*, *ibid*, at para 44.

⁸ *Canada (Minister of Citizenship and Immigration) v. Khosa*, 2009 SCC 12, [2009] 1 S.C.R. 339.

[23] 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.⁹ The level of deference which the RAD provides to the RPD depends on the questions at issue as addressed above.

[24] 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*.

[25] 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.¹⁰ 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 hearing¹¹ 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.

[26] 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.¹² 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

⁹ Subsection 110(1) of the *Act*.

¹⁰ Section 107 of the *Act*.

¹¹ Section 170 of the *Act*.

¹² 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.¹³ Hearings are also limited to only specific issues (serious credibility issues) which are directed by the RAD.¹⁴

[27] 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 subsection 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.¹⁵

[28] *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”.¹⁶ *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.¹⁷

[29] For the reasons outlined above, issues raised by counsel that engage questions of procedural fairness are reviewable on the correctness standard. In addition, 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.

¹³ Subsection 110(4) of the *Act*.

¹⁴ *Refugee Appeal Division Rules* (the “Rules”), SOR/2012-257; *Rule 57*.

¹⁵ *Newton v. Criminal Trial Lawyers’ Association*, 2010 ABCA 399, para 82.

¹⁶ *Newton, ibid*, at para 95.

¹⁷ *Dunsmuir v. New Brunswick*, 2008 SCC 9, at para 47.

Analysis of the merits of the appeal

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

[31] **Issue 1:** Counsel for the appellant identified as the first ground of the appeal whether the RPD member failed to observe a principle of natural justice or otherwise acted beyond her powers because the member demonstrated a pervasive sense of skepticism at the hearing by ignoring material evidence and sworn declaration by the applicant. I disagree. A detailed review of the RPD decision clearly shows that the RPD member demonstrated considerable care in analyzing all of the claimant's evidence including his testimony and the documentary evidence that had been provided. I find that there has been no breach of natural justice or procedural fairness and that the RPD member did not ignore the appellant's evidence.

[32] Counsel submits that it is a breach of procedural fairness for the RPD member to demand that witnesses must have personal knowledge of the applicant's sexual orientation. Counsel's concern here needs to be addressed as to process which engages natural justice or procedural fairness and the RPD's factual conclusions which engages a review standard of reasonableness.

[33] Turning first to the issue procedural fairness, I find that counsel's submission that the RPD member demanded that witnesses must have personal knowledge of the applicant's sexual orientation has no foundation. There is no evidence that the RPD member demanded that witnesses have personal knowledge of the applicant's sexual orientation. As such, I find that there has been no breach of procedural fairness or natural justice in this respect.

[34] The relevant issue instead is the weight given by the RPD member in her analysis of the letters submitted as corroborating evidence. Here I find that counsel has overstated the RPD member's conclusion as to the documentary evidence that had been presumably submitted by the appellant in order to corroborate his sexual orientation. The RPD member gave little weight to the support letters that had been written by the appellant's landlord and contacts in the the lesbian, gay, bisexual and transgender ("LGBT") community. As noted by the RPD member in her reasons, these letters appear to be based on what the appellant may have told the letter writers and do not demonstrate any personal knowledge of the appellant's sexuality. If the intent of the documentary evidence is in fact to provide corroborating evidence of his sexuality, I find it would be reasonable to expect that the letter writers would be in a position to make such a statement based on their personal knowledge of the appellant but this was not the case. I find that the RPD member's conclusion in this respect was reasonable.

[35] **Issue 2:** Whether the Panel based its decision on an erroneous finding of fact and made its decision in a perverse or capricious manner without regard to the material before it. Counsel specifically pointed to the RPD member's conclusion as to the appellant's return to Nigeria from the UK. The RPD member did not state that she had reached this conclusion as submitted by counsel "simply because he was promised 2000 pounds upon his return to Nigeria". The RPD member found that the appellant's return to Nigeria undermined his credibility regarding his subjective fear and that given the extreme risk to homosexual men in that country, that a reasonable person facing that risk would avail themselves of the first opportunity for protection by seeking options such as asylum in the UK to avoid returning to Nigeria. I find that based upon the totality of the evidence that the RPD member's conclusion in this respect was reasonable.

[36] Counsel also submits that the RPD member also erred in dismissing the appellant's explanation as to why he could not recall the names and details of alleged sexual partners in Nigeria and did not obtain support letters as to the persecution he faced in Nigeria. The

appellant testified that he was trying to protect his family and friends from any problems in Nigeria given the sanctions against homosexuals and potentially against those seen to assist homosexuals. The RPD gave little weight to this explanation, noting that there is no objective evidence that the Nigerian authorities would be interested in intercepting any mail or emails sent to the appellant in Canada or that they have a general practice of doing this to others from Nigeria who make refugee claims in Canada. I find that based upon the totality of the evidence that the RPD member's conclusion in this respect was reasonable.

[37] **Issue 3:** Whether the RPD breached the principle of procedural fairness when it relied heavily on the alleged asylum claim entries by the UK border services as evidence of appellant's lack of credibility without giving the appellant an opportunity to introduce evidence that he did not actually make an asylum claim in the UK. The evidence relating to the appellant's alleged asylum claim had been provided in the Minister's evidence provided to the RPD and the appellant prior to the August 9, 2013 sitting of the RPD claim. The appellant was thus on notice that this issue may be raised in the hearing and there is no indication that the appellant made any application for post-hearing evidence to be submitted. I also note that when filing the appellant's Record, the appellant notified the RAD of his intent to submit an application to consider late evidence. The late evidence would be composed of the appellant's UK immigration documents in order to document his assertion that he had not filed for asylum in the UK. In his affidavit, the appellant stated that he expected to receive these documents by November 7, 2013. To date, no further communication was received by RAD from the appellant or his counsel on this matter. I find there has been no breach of procedural fairness in this respect.

[38] In summary, I find that there has been no breach of natural justice or procedural fairness and that the RPD findings and conclusions are reasonable. 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

[39] 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.

“Douglas Fortney”

(signed)

Douglas Fortney

January 3, 2014

Date