Immigration and
Refugee Board of Canada

Refugee Appeal Division

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

Section d'appel des réfugiés

RAD File No. / N° de dossier de la SAR : MB3-04687

Private Proceeding / Huis Clos

Reasons and decision – Motifs et décision

Person who is the subject of the appeal	**XXXX XXXX XXXX**	**Personne en cause**
Appeal considered/heard at	Montréal, Quebec	**Appel instruit à**
Date of decision	February 27, 2014	**Date de la décision**
Panel	Normand Leduc	**Tribunal**
Counsel for the person who is the subject of the appeal	M^{e} Stephanie Valois	**Conseil de la personne en cause**
Designated representative	XXXXX XXXXX	**Représentant désigné**
Counsel for the Minister	Farah Merali	**Conseil du ministre**

Canada

REASONS AND DECISION

INTRODUCTION

[1] **XXXX XXXX XXXX**, a citizen of Saint Vincent and the Grenadines, is appealing against the decision of the Refugee Protection Division (RPD) rejecting his claim for refugee protection.

DETERMINATION OF THE APPEAL

[2] Pursuant to subsection 111(1) of the *Immigration and Refugee Protection Act* (IRPA), the Refugee Appeal Division (RAD) confirms the RPD's determination, namely, that XXXX XXXX XXXX is not a "Convention refugee" under section 96 of the IRPA or a "person in need of protection" under section 97 of the IRPA.

BACKGROUND

[3] The appellant is a young, 21-year-old man who, in XXXX 2012, left his country for Canada—he left after the death of his mother, with whom he was living—at the invitation of his brother, who lives here. He alleged before the RPD that he was a person with a mental health disability, for which he was receiving medication in Canada that allowed him to function adequately in society.

[4] The appellant alleged that he is afraid of returning to his country, where he would be alone, with no family members able to help or shelter him, and where medical care is inadequate. The appellant is allegedly afraid of being mistreated and ostracized by the general population and by the country's authorities if he had to return there.

[5] The reason the RPD rejected the claim for refugee protection was that the evidence presented did not show that what the appellant fears if he were to return to his

country amounted to persecution, within the meaning of the Convention, or to a danger of torture, a risk to his life or a risk of cruel and unusual treatment or punishment.

[6] Before the RAD, the appellant submits that the RPD erred in its assessment of the evidence presented when it concluded that, if he were to return to his country, what he fears did not amount to persecution. He also submits that the RPD erred in its analysis of the application to his case of section 97 of the IRPA.

[7] For those reasons, he is requesting that the RAD set aside the RPD determination and grant him refugee protection.

[8] The Minister of Public Safety of Canada (the Minister), through his representative, intervened before the RAD by submitting a notice of intervention, in which he submits that the RPD's determination was reasonable and that the RAD should dismiss the appeal.

ADMISSIBILITY OF NEW EVIDENCE

[9] With a letter dated January 15, 2014, and received by the Immigration and Refugee Board of Canada (IRB) the following day, the appellant's designated representative submitted what could be new evidence to the RAD: a letter from Dr. XXXX XXXX XXXX XXXX XXXX. The letter was dated January 6, 2014, and describes the state of the appellant's mental health.

[10] Subsection 110(4) of the IRPA states that the person who is the subject of the appeal may present to the RAD only evidence that arose after the rejection of their 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.

[11] Subparagraph 3(*g*)(iii) of the *Refugee Appeal Division Rules* also requires that the appellant's memorandum include full and detailed submissions regarding how any new

evidence presented meets the requirements of subsection 110(4) of the IRPA and how that evidence relates to the appellant.

[12] First, I note that the appellant, or his designated representative, did not comply with the requirements of subparagraph 3(*g*)(iii) of the Rules in that he has not provided full and detailed submissions regarding how the evidence meets the requirements of subsection 110(4) of the IRPA.

[13] There is currently no case law from the higher courts on the application of subsection 110(4). However, the IRPA contains a similar provision that applies to pre-removal risk assessments (PRRA). This is paragraph 113(*a*), which states the following:

> **113.** Consideration of an application for protection shall be as follows:
>
> (*a*) an applicant whose claim to refugee protection has been rejected may present only new evidence that arose after the rejection or was not reasonably available, or that the applicant could not reasonably have been expected in the circumstances to have presented, at the time of the rejection.

[14] Although the provisions are almost identical, and although the functions of the RAD and the PRRA are not the same, I am still of the opinion that, because of the similarities, the case law on the application of paragraph 113(*a*) also applies to subsection 110(4) of the IRPA, making any necessary adaptations.

[15] The key decision regarding the application of paragraph 113(*a*) is the Federal Court of Appeal decision in *Raza*.[1] In paragraphs 13 to 15 of *Raza*, the Honourable Justice explains the criteria and the manner in which new evidence submitted must be considered, as follows:

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1 *Raza v. MCI*, 2007 FCA, 385.

[13] …Paragraph 113(*a*) asks a number of questions, some expressly and some by necessary implication, about the proposed new evidence. I summarize those questions as follows:

1. Credibility: Is the evidence credible, considering its source and the circumstances in which it came into existence? If not, the evidence need not be considered.

2. Relevance: Is the evidence relevant to the PRRA application, in the sense that it is capable of proving or disproving a fact that is relevant to the claim for protection? If not, the evidence need not be considered.

3. Newness: Is the evidence new in the sense that it is capable of:

   (a) proving the current state of affairs in the country of removal or an event that occurred or a circumstance that arose after the hearing in the RPD, or

   (b) proving a fact that was unknown to the refugee claimant at the time of the RPD hearing, or

   (c) contradicting a finding of fact by the RPD (including a credibility finding)?

   If not, the evidence need not be considered.

4. Materiality: Is the evidence material, in the sense that the refugee claim probably would have succeeded if the evidence had been made available to the RPD? If not, the evidence need not be considered.

5. Express statutory conditions:

   (a) If the evidence is capable of proving only an event that occurred or circumstances that arose prior to the RPD hearing, then has the applicant established either that the evidence was not reasonably available to him or her for presentation at the RPD hearing, or that he or she could not reasonably have been expected in the circumstances to have presented the evidence at the RPD hearing? If not, the evidence need not be considered.

   (b) If the evidence is capable of proving an event that occurred or circumstances that arose after the RPD hearing, then the evidence must be considered (unless it is rejected because it is not credible, not relevant, not new or not material).

[14] The first four questions, relating to credibility, relevance, newness and materiality, are necessarily implied from the purpose of paragraph 113(*a*) within the statutory scheme of the IRPA relating to refugee claims and pre removal risk assessments. The remaining questions are asked expressly by paragraph 113(*a*).

[15] I do not suggest that the questions listed above must be asked in any particular order, or that in every case the PRRA officer must ask each question. What is important is that the

> PRRA officer must consider all evidence that is presented, unless it is excluded on one of the grounds stated in paragraph [13] above.

[16] In this case, I am of the opinion that the letter from Dr. Poirier does not meet the criterion of relevance mentioned in *Raza*. In fact, the state of the appellant's mental health was not questioned by the RPD (see paragraphs 11 and 12 of the RPD's reasons), and so, before the RAD, the document is not capable of proving or disproving a fact that is relevant to the claim for refugee protection.

[17] As a result, I do not accept that document as evidence.

DECISION ON WHETHER TO HOLD A HEARING

[18] Under subsection 110(6) of the IRPA, the RAD may hold a hearing if, in its opinion, new evidence presented on appeal is admissible and meets the three following criteria: 1) it raises a serious issue with respect to the credibility of the person; 2) it is central to the decision with respect to the refugee protection claim; and 3) if accepted, it would justify allowing or rejecting the refugee protection claim.

[19] Since the provision preceding that provision was not satisfied, given that I did not accept any new documents into evidence, I conclude that a hearing may not be held in the context of this appeal.

STANDARD OF REVIEW

[20] The IRPA does not expressly set out the standard of review that the RAD should apply when reviewing RPD decisions, nor is that standard of review set out explicitly in the case law.

[21] In this case, the appellant submits in his memorandum that the RAD has the jurisdiction to hear the case *de novo*, that it must draw its own conclusions after reviewing the evidence presented to the RPD, and that the RAD owes no deference to the RPD.

[22] In *Dunsmuir*,[2] rendered in 2008, the Supreme Court of Canada revisited the foundations of judicial review and the standards of review applicable in various situations. In order to simplify the analysis, the Supreme Court determined that there should now be only two standards of review: correctness and reasonableness.

[23] Although the RAD does not conduct judicial reviews of RPD decisions, but rather acts as an appellate body within the same administrative tribunal, that is, the IRB, I am of the opinion that without more direct guidance from higher courts, the principles developed in *Dunsmuir* can be applied to the RAD.

[24] Paragraph 51 of the Supreme Court's decision in *Dunsmuir* states that:

> …questions of fact, discretion and policy as well as questions where the legal issues cannot be easily separated from the factual issues generally attract a standard of reasonableness while many legal issues attract a standard of correctness. Some legal issues, however, attract the more deferential standard of reasonableness.

[25] In paragraph 19 of *Kalejova* (*Kalejova v. M.C.I.,* 2010, FC 252), the Federal Court of Canada writes:

> [19] As for the Board's ultimate finding on persecution, it is a mixed question of fact and law. It is about the application of sections 96 and 97 of the Act in the applicants' specific situation. The standard of review for this matter is reasonableness. As noted in *Sagharichi v. Canada (Minister of Employment and Immigration)* (1993), 182 N.R. 398 (F.C.A.) at paragraph 3:
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> > It is true also that the identification of persecution behind incidents of discrimination or harassment is not purely a question of fact but a mixed question of law and fact, legal concepts being involved. It remains, however, that, in all cases, it is for the Board to draw the conclusion in a particular factual context by proceeding with a careful analysis of the evidence adduced and a proper balancing of the various elements contained therein, and the intervention of this Court is not warranted unless the conclusion reached appears to be capricious or unreasonable.

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[2] *Dunsmuir v. New Brunswick*, 2008 SCC 9, (2008) 1 SCR 190.

[26] In this case, the question of whether the RPD erred in finding that the evidence presented failed to establish a fear of persecution for the appellant if he were to return to his country is a question of mixed law and fact. As a result, I will apply the standard of reasonableness.

[27] I am also of the opinion that the question of whether the RPD erred in the application of section 97 of the IRPA to this case is also a question of mixed law and fact that is reviewable on a standard of correctness.

[28] Contrary to the appellant's submission in his memorandum, I am of the opinion that nothing in the IRPA indicates that the RAD may conduct a hearing *de novo*, thereby applying the standard of correctness to all matters. Under subsection 110(6) of the IRPA, the RAD may hold a hearing if, in its opinion, the new evidence presented on appeal is admissible and meets the following three criteria: 1) it raises a serious issue with respect to the credibility of the person; 2) it is central to the decision with respect to the refugee protection claim; and 3) if accepted, it would justify allowing or rejecting the refugee protection claim.

[29] Since the provision preceding that provision was not satisfied in this case because no new evidence was accepted in the current appeal, I have concluded that a hearing may not be held in this case and, more importantly, a hearing *de novo* may not be held either. Moreover, I am of the opinion that the restrictions imposed by subsection 110(4) of the IRPA, dealing with the possibility for an appellant to present new evidence to the RAD, also show that Parliament did not intend for the RAD to hold hearings *de novo*.

[30] In paragraph 47 of *Dunsmuir*, the Court states that reasonableness is concerned mostly with the existence of justification, transparency and intelligibility within the decision-making process. But it is also concerned with whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and

the law. Judicial deference is therefore called for, and deference must be given to the RPD decision.

ANALYSIS

[31] The first issue in this case is whether the RPD erred when it concluded that the evidence presented failed to establish that what the appellant fears if he were to return to his country amounted to persecution.

[32] The RPD's reasons make it clear that it was of the opinion that the evidence showed that the mistreatment that the appellant fears from society in general because of the state of his mental health if he were to return to his country would occur only if his mental illness was not treated by doctors in his country (see paragraph 17 of the RPD reasons).

[33] The RPD was of the opinion that leaving the appellant's condition untreated could lead to a succession of events. The state of the appellant's health could deteriorate and leave him disorganized. This could attract the attention of society in a negative way, in that they would regard him with aversion, disdain, intolerance and discrimination and that they would isolate him (see paragraph 18 of the RPD reasons).

[34] Considering the appellant's testimony that he would probably be scorned by society in his country if he was not cared for and that he would be left to his own devices in terms of meeting his needs, and considering the documentary evidence that non-governmental organizations assist people such as the appellant, the RPD was of the opinion that treatment of persons with an untreated mental health disability in Saint Vincent and the Grenadines did not amount to persecution (see paragraphs 19 to 22 of the RPD reasons).

[35] Alternatively, the RPD was of the opinion that, even if the treatment of persons with an untreated mental health disability did amount to persecution, the appellant did not demonstrate that his mental illness would not be treated if he were to return to his

country. To reach this conclusion, the RPD considered the documentary evidence about the care provided to persons with mental health disabilities in Saint Vincent and the Grenadines, that is, that care is available in that country (see paragraphs 23 to 25 of the RPD reasons).

[36] The RPD, in its analysis, also noted the fact that, according to the testimony of the appellant's designated representative, who supposedly informed himself about the care available, the medical care provided in Saint Vincent and the Grenadines would probably be able to cure the appellant's symptoms (see paragraph 26 of the RPD reasons).

[37] More importantly, the RPD was of the opinion that, if the appellant received treatment in his country, what he fears if he has to return there would not amount to persecution.

[38] The RPD subsequently responded to a submission from counsel for the appellant that the appellant would probably be confined to an institution if he were to return to his country and that the treatment he would be subjected to there would amount to persecution, just like the treatment he could be subjected to at the hands of the police, who might arrest him. The RPD acknowledged that it was likely that the appellant would be confined to an institution in his country, given his lack of a family and a social support system around him, and that the police could arrest him if he was left alone. Once again, however, the treatment to which the appellant could be subjected would not amount to persecution (see paragraphs 33 to 49 of the RPD reasons).

[39] In his memorandum, the appellant submits that [translation] "it seems that persons with mental health disabilities do not have access to adequate care that would enable them to function in society," and that he would thus become homeless and rejected by society, which would amount to persecution.

[40] I do not agree with the appellant's premise. In my opinion, the appellant failed to demonstrate that persons with mental health disabilities receive no care in Saint Vincent

and the Grenadines. The evidence presented, as considered by the RPD in paragraphs 23 to 26 of its reasons, seems to demonstrate the opposite, that care is available in Saint Vincent and the Grenadines. The evidence also answers the appellant's argument that, if he did not receive care and ended up homeless, he would be subjected to persecution by the police, who could arrest him.

[41] The appellant also submits that his designated representative was quoted incorrectly when the RPD wrote, in paragraph 26 of its reasons, that the designated representative had done research that led to the belief that the appellant's symptoms could be [translation] "cured" in his country. However, I am of the opinion that, even if the RPD erred in this matter, the error was not sufficient to invalidate the decision as a whole because it was also based on the documentary evidence submitted about the health care available in Saint Vincent and the Grenadines. I point out once more that the RPD initially found that, even if the appellant were not to receive care in his country, his treatment at the hands of the population as a whole would not amount to persecution.

[42] The appellant then submits that the RPD erred in its analysis of the institutional conditions for persons with mental health disabilities by finding that the appellant failed to demonstrate that the government of Saint Vincent and the Grenadines [translation] "wilfully attempted to persecute him or discriminate against him by deliberately allocating insufficient funds to the treatment of such illness," and that the RPD should have assessed the conditions of institutional detention, which, according to the appellant, are inhumane and amount to persecution.

[43] However, I am of the opinion that the documentary evidence presented does not show that conditions of institutional detention are inhumane and consequently amount to persecution, as the appellant alleges. The fact, pointed out by the appellant, that some sources indicate that patients have had to sleep on the floor because there are so many of them does not in itself show, in my opinion, that conditions are inhumane.

[44] The second issue in this case is whether the RPD erred in its analysis of the application of section 97 of the IRPA.

[45] The appellant finally submits that the RPD should have analyzed the living or detention conditions awaiting the appellant in his country from the perspective of section 97, which it did not do.

[46] In my opinion, the RPD conducted that analysis in paragraphs 50 to 54 of its reasons. The RPD concluded that the fact that the appellant would be detained, and the conditions of the detention themselves, did not amount to a risk of cruel and unusual treatment or punishment. I am of the opinion that it was open to the RPD to come to such a conclusion, given the evidence presented and discussed above. Moreover, it was open to the RPD to find, as it did, that the lack of medical care, or of better medical care, would be an exception under subparagraph 97(1)(*b*)(iv) of the IRPA.

[47] As a result of the preceding, I am of the opinion that the RPD's decision as a whole is reasonable because it is transparent and intelligible and because it is falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and the law.

REMEDIES

[48] For these reasons, I confirm the determination of the RPD, namely, that **XXXX XXXX XXXX** is not a "Convention refugee" or a "person in need of protection."

[49] The appeal is dismissed.

Normand Leduc

Normand Leduc

February 27, 2014

Date

IRB translation

Original language: French