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

2014 CanLII 13553 (CA IRB)

RAD File No. / N° de dossier de la SAR : VB3-02617

Private Proceeding / Huis clos

Reasons and decision – Motifs et décision

Person(s) who is(are) the subject of the appeal	XXXX XXXX	**Personne(s) en cause**
Appeal considered / heard at	*In Chambers* at Vancouver, BC	**Appel instruit à**
Date of decision	January 21, 2014	**Date de la décision**
Panel	Douglas Fortney	**Tribunal**
Counsel for the person(s) who is(are) the subject of the appeal	Lori A. O’Reilly Barrister and Solicitor	**Conseil(s) du (de la/des) personne(s) en cause**
Designated representative	N/A	**Représentant(e) désigné(e)**
Counsel for the Minister	N/A	**Conseil du ministre**

Canada

REASONS FOR DECISION

[1] XXXX XXXX (the “appellant”), a citizen of Fiji, 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 is neither a Convention refugee pursuant to section 96 of the *Act* nor a person in need of protection pursuant to section 97 of the *Act*. This appeal is therefore dismissed.

BACKGROUND

[3] The appellant fears returning to Fiji because he alleges that his father has been a target of threats and extortion at the hands of landowners, or thugs, or their accomplices. This arises from a dispute over the lease of land that the appellant’s father has. The appellant came to Canada in XXXX 2008 with a temporary work permit and made his claim for refugee protection on January 21, 2013.

[4] The RPD heard the appellant’s refugee protection claim on August 29, 2013. The RPD’s reasons for the decision were delivered orally with written reasons and a Notice of Decision dated October 7, 2013.

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

[6] The RPD’s written reasons dated October 7, 2013, stated that the appellant’s case for refugee protection was rejected. The determinative issue in this claim was credibility. The RPD Member also found that there was no nexus to a Convention ground of refugee protection and

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

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that the appellant had not demonstrated that it is more likely than not that he would face an individualized risk to his life, a risk of cruel and unusual treatment or punishment or a danger of torture if he returned to Fiji.

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Submissions

[7] The appellant submits the issue is whether the RPD based its decision on erroneous findings of fact that it made "in a perverse or capricious manner or without regard to the evidence".

[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 not made any submissions as to the standard of review in this appeal.

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

Consideration of New Evidence

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

Application for an Oral Hearing

[12] The appellant has not requested an oral hearing pursuant to subsection 110(6) of the *Act*.

[13] 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.

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[14] 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.

[15] 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.

[16] 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

[17] 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.

[18] 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.

[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.

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

[20] 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 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*.

[21] 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.

[22] 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.

[5] *Newton v. Criminal Trial Lawyers' Association*, 2010 ABCA 399, at para. 43.
[6] *Ibid*, at para. 44.
[7] *Canada (Minister of Citizenship and Immigration) v. Khosa*, 2009 SCC 12, [2009] 1 S.C.R. 339.
[8] Subsection 110(1) of the *Act*.

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[23] 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*.

[24] 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 hearing[10] 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.

[25] 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 <u>heard</u> *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]

[26] 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:

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[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*, SOR/2012-257; *Rule* 57.

> 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]

[27] *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]

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

Analysis of the Merits of the Appeal

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

[30] Counsel submits that the RPD Member erred when he concluded that the appellant revised the date of his father's 2012 beating to "maybe XXXX or XXXX". The RDP reasons refer to the appellant's Basis of Claim (BOC) form where it states this latest incident occurred in XXXX 2012. The RPD Member then goes to state that the appellant testified at the hearing that it happened in the XXXX half of 2012, then that the appellant later revised the date to "maybe XXXX or XXXX". Counsel submits that the appellant did not revise or change his testimony and his testimony at his refugee hearing was internally consistent.

[14] *Newton v. Criminal Trial Lawyers' Association*, 2010 ABCA 399, para. 82.
[15] *Newton*, *ibid*, at para. 95.
[16] *Dunsmuir v. New Brunswick*, 2008 SCC 9, at para. 47.

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[31] I have reviewed the audio CD recording of the RPD hearing. The following testimony relevant to this issue takes place at about the 00:08:05 time mark:

> RPD Member: He was physically assaulted twice? When was that?
>
> Appellant: In 2000, I was get beaten too.
>
> RPD Member: There's two things going on here. So tell me when was your father assaulted?
>
> Appellant: Last year
>
> RPD Member: And when was that.
>
> Appellant: Like...XXXX?
>
> (00:08:47 time mark)
>
> RPD Member: Twice. Last year, when was that?
>
> Appellant: It's like almost half of the year and the XXXX between that, I'm not really sure which month.
>
> RPD Member: How did you find out that he was assaulted?
>
> Appellant: Normally sometimes I call to my dad he was in phone, sometimes I send some money to help my family.
>
> RPD Member: Why is it you are unable to tell me which month he was assaulted in?
>
> Appellant: Something in XXXX/XXXX
>
> RDP Member: How did you find out that he was assaulted?
>
> Appellant: Normally sometimes I call to my dad he was in phone, sometimes I send some money to help my family.
>
> RPD Member: Why is it you are unable to tell me which month he was assaulted in?
>
> Appellant: Something in XXXX/XXXX

[32] Counsel also canvassed this issue later in the hearing starting at about the 00:33:56 time mark:

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> Counsel: The Member put an inconsistency to you, in your BOC you say your father was assaulted that assaulted XXXX 2012, but you've testified today that it was XXXX or XXXX...
>
> Appellant: I wasn't sure of the month it was, but 2012, end of 2012, he was assault by landowners.
>
> Counsel: Are you saying your BOC may not be correct, or?
>
> Appellant: It is correct, I am not sure of the month. XXXX, two three months, I am not sure which that.
>
> Counsel: The Member relies on the BOC being true. They are expecting you would say XXXX 2012 because that is what you wrote -
>
> Appellant: Because I called him in XXXX so I was telling and he was telling I get beaten and threatened so ok, I write it as XXXX, but a couple of weeks or months, I didn't called him for a while...he was crying and telling that this thing was happening, he needed money for this problem.

[33] Counsel submits that the appellant's evidence is not inconsistent as XXXX and XXXX are both considered to be the XXXX half of 2012. However, I find that the appellant's evidence in the BOC and his testimony at the hearing as evidenced in the above excerpts demonstrates considerable inconsistency on this issue. The RPD Member found it not to be reasonable that the appellant would not have a more specific time that his father was assaulted, especially since he testified that he speaks to his father often over the phone. Based on the evidence, I find the RPD Members' conclusion to be reasonable.

[34] Counsel submits that the RPD Member erred when it <u>required</u> (my emphasis) corroborative evidence from his father relating to the father's experience of threats and assaults due to the land lease dispute with the landowners which constitutes a critical element of the appellant's underlying allegations. It is important to note that the RPD Member had, not so much required corroborative evidence as such, but found that its absence was not reasonable as this threats and assaults formed the basis of the appellant's claim and especially since the appellant

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made his claim for refugee protection over seven months before the hearing. Counsel refers to the *Adu*[17] case , but in that case the Court said the following:

> The "presumption" that a claimant's sworn testimony is true is always rebuttable, and, in appropriate circumstances, may be rebutted by the failure of the documentary evidence to mention what one would normally expect it to mention.

In *Matheen*[18] the Court also commented on the absence of corroborative evidence that could be obtained. In summary, while it is true that corroboration is not normally required, where there are reasons to doubt the claimant's testimony and where the evidence is reasonably obtainable, it is not an error to require corroboration or rely on its absence to draw adverse inferences.

[35] The RPD Member found that the appellant's testimony that a Justice of the Peace might be beat up if he signed an affidavit to be improbable, on a balance of probabilities, especially since the evidence that would be given in an affidavit would be sent to Canada and not given to the landowners. Counsel submits that the appellant had given a reasonable explanation as to why he did not have any corroborating documents, specifically that his father could not get an Affidavit signed by a Justice of the Peace in his locality, because the Justice of the Peace could be beaten up by the landowners. Counsel further submits that it is reasonable to assume the landowners had the intimidation techniques and the power available to continue to cause harm to the appellant's father in any way possible, including implied intimidation to those who were seen in a position to assist the appellant's father, such as a Justice of the Peace, signing a sworn document to the appellant's father attesting to the landowners' threats and assaults.

[36] The appellant has not presented any documentary evidence that Fijian authorities are reluctant to at least provide documentary corroboration of citizens facing threats and assaults as alleged by the appellant. I find the appellant's submission that Fijian authorities have been intimidated in this manner to be speculative and not supported by the evidence. I find to be reasonable the RPD Member's conclusion as to the absence of corroborative evidence as detailed above. I also find to be reasonable the RPD Member's conclusion that the appellant's

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[17] *Adu v. Canada (Minister of Employment and Immigration)*, (F.C.A.) (No. A-I 94-92), Hugessen, Strayer, Robertson).
[18] *Matheen v. Canada (Minister of Citizenship and Immigration)*, 2006 FC 395

explanation that Fijian authorities would be at risk of being assaulted by the landowners in providing such evidence was, on a balance of probabilities, improbable.

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[37] Counsel submits that the RPD Member misconstrued the evidence by referring to the XXXX XXXX XXXX XXXX (XXXX) and how they could be instrumental in resolving land disputes. Counsel further submits that there was no evidence before the RPD Member that the XXXX is responsible for protecting citizens or can prosecute criminal activity and that this is the responsibility of the Fijian government, which includes but is not limited to Fijian police and court system.

[38] In his reasons, the RPD Member found that the XXXX could have been instrumental in resolving the land lease dispute between the appellant's father and the police and the landowners. The RDP Member then goes on to state that without corroborating documents to indicate that the police would not respond to complaints of the appellant's father, the appellant had not provided clear and requisite evidence that state protection, in his circumstances, is inadequate. The RDP Member found the appellant's testimony that the agents of the government or the police would not offer adequate protection not to be credible. It is clear from reading the RDP Member's reasons that he was not suggesting that the XXXX was responsible for protecting citizens or can prosecute criminal activity. References are clearly made to corroborating documents to indicate that the police (my emphasis) would not respond to the complaints of the appellant's father. Based on the evidence, I find to be reasonable the RPD Member's conclusion that the appellant has not provided clear and requisite evidence that state protection, in his circumstances, is inadequate.

[39] Finally, counsel submits that the Member misconstrued the evidence by not taking into account the incidents surrounding the 2000 coup, as this was evidence of cumulative persecution, or alternatively, cumulative discrimination amounting to persecution. Counsel submits that the incidents showed a consistent pattern of persecution perpetrated by indigenous Fijians, on the appellant and his family, who were Indo-Fijians.

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[40] In his reasons, the RPD Member found that that these incidents in 2000 had little bearing on the appellant's claim as he remained in Fiji for eight years afterwards. The appellant's family remains in Fiji so, on a balance of probabilities, the RPD Member found that the unrest in 2000 was directed at the government of the day and that the appellant and his family suffered some consequential difficulties arising from the coup which were short lived. The RDP Member found that if the appellant still feared the outcome of the fallouts from 2000, it would have been more reasonable than not that he would have made a refugee claim upon his arrival to Canada. Based on the evidence, I find this to be a reasonable conclusion by the RPD Member.

[41] The appellant testified as to general violence after the 2000 coups which I find does not constitute a personalized risk to the appellant. Country documents indicate that all Fijians have been subjected to a rise in crime, especially during Fiji's time of political instability during the coup of 2000. Based on the appellant's evidence and the country documents, I find that the violence and criminality the appellant experienced during the times of political turmoil in 2000 were generalized criminal elements that were widespread in Fiji.

[42] I have considered whether the harassment/discrimination suffered by the appellant amounts to persecution. Persecution is not defined by the Convention.[19] However, persecution can mean sustained or systemic violation of basic human rights demonstrating a failure of state protection.[20] Case law has stated that to be considered persecution, the mistreatment suffered or anticipated must be serious,[21] occur with repetition or persistence in a systematic way,[22] although in some cases the harm need not be repeated or persistent. In order to determine whether the particular mistreatment would fall within the definition of 'serious' it is necessary to determine what interest of the appellant might be harmed and to what extent the subsistence, enjoyment, expression or exercise of that right might be effected. In other words the legal question to be

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[19] *1951 Convention Relating to the Status of Refugees*.Office of the United Nations High Commissioner for Refugees, "Handbook on Procedures and Criteria for Determining Refugee Status", under the 1951 Convention.
[20] James C. Hathaway, The Law of Refuggess Status (Toronot: Buttersworths, 1991) pp. 104-105, citied with approval in *Canada* v. *Ward* (1993) 3 F.C. 675 (C.A).
[21] *Sagharichi v. Canada* (Minister of Employment and Immigration) (1993), 182 N.R. 398 (F.C.A.).
[22] *Canada (Attorney General) v. Ward*, [1993] 2 S.C.R. 689.

determined is: does the persecution alleged by the appellant threaten his basic human rights in a fundamental way?

[43] Counsel submits that the attacks on the appellant's father in 2000 and 2012 on a cumulative basis amounts to persecution .While the experience of the appellant's father has been difficult, it does not, even cumulatively, amount to persecution. I find that what the appellant and his family experienced amounts to discrimination and harassment at most but does not rise to the level of persecution. I conclude that there is no persuasive evidence of sustained or systemic violation of basic human rights.

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

REMEDY

[45] For all these reasons, I confirm the determination of the RPD, namely, that 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 21, 2014

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Date

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