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 : MB5-01404

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 at	Montréal, Quebec	**Appel instruit à**
Date of decision	October 5, 2015	**Date de la décision**
Panel	Normand Leduc	**Tribunal**
Counsel for the person who is the subject of the appeal	M^e^ Stéphanie Valois	**Conseil de la personne en cause**
Designated representative	N/A	**Représentant désigné**
Counsel for the Minister	N/A	**Conseil du ministre**

REASONS FOR DECISION

INTRODUCTION

[1] **XXXX XXXX XXXX**, who claims to be a citizen of the Democratic Republic of the Congo (DRC), is appealing against the decision of the Refugee Protection Division (RPD) to reject her claim for refugee protection.

[2] She is not presenting any new evidence on appeal and is not requesting that a hearing be held before the Refugee Appeal Division (RAD).

DETERMINATION OF THE APPEAL

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

BACKGROUND

[4] The appellant claims in her Basis of Claim Form (BOC Form) that she submitted to the RPD on October 1, 2014, that her name is XXXX XXXX XXXX, born on XXXX XXXX, 1980, and that she is from the city of Kinshasa in the DRC.

[5] The appellant claims to be homosexual and that in the DRC she dated a member of her basketball team named XXXX. She claims that on XXXX XXXX, 2011, when leaving a basketball game with XXXX, she was assaulted, beaten and raped by four people in police uniforms who allegedly criticized her relationship with XXXX.

[6] The appellant claims that her father disowned her because of her sexual orientation following this assault.

[7] She claims she left the DRC on XXXX XXXX, 2011, and went to the Republic of the Congo (Brazzaville) where she allegedly lived with a woman she met at the market.

[8] The appellant claims she was forced out by Congolese authorities to Kinshasa in XXXX 2014. She claims she took refuge at the home of a friend of her aunt's whose spouse helped her leave the DRC for Canada on July 7, 2014, where she claimed refugee protection on or around September 30, 2014.

[9] Canada's Minister of Public Safety and Emergency Preparedness (the Minister), through his representative, intervened before the RPD and filed a notice of intervention on or around November 28, 2014, alleging that the appellant does not possess acceptable documentation establishing identity and that therefore, the RPD should reject her refugee protection claim.

[10] In particular, the Minister submitted that he discovered that the appellant had lived in Belgium between 2007 and 2014 under another identity and that some of the identity documents she submitted or that were intercepted in the mail addressed to her were counterfeit.

[11] On or around November 27, 2014, the appellant submitted a number of documents to the RPD, including an amended BOC Form in which she claims that the alleged assault and rape of which she was the victim in the DRC occurred on XXXX XXXX, 2003, and that she then became engaged in 2005 to a man named XXXX XXXX in order to please her father. She claims that her fiancé was a member of the army of XXXX XXXX XXXX XXXX XXXX XXXX and that he joined the rebellion in the east of the country.

[12] The appellant claims she was arrested in XXXX 2007 by men in uniform who accused her of supporting the rebellion. She claims that she was freed with the help of a guard at the prison where she was detained and that she left the DRC in XXXX 2007 for Belgium, where she requested asylum, which was refused. She claims she arrived in Canada in May 2014.

[13] The RPD rejected her claim for refugee protection on the ground that the appellant did not establish her identity on a balance of probabilities.

[14] Before the RAD, the appellant submits that the RPD erred for the following reasons:

- it accepted into evidence the documents from the Minister, even though they were submitted three days before the date scheduled for the hearing without any valid explanation for the delay, and postponed the hearing to a later date;

- it failed to assess the credibility of her testimony in order to establish her identity; and

- it failed to consider the school documents submitted as evidence in order to establish her identity.

[15] For these reasons, the appellant is requesting that the RAD allow the appeal.

THE RAD'S ROLE

[16] The IRPA does not expressly set out the standard of review or intervention that the RAD should apply when reviewing RPD decisions.

[17] In this file, the appellant submits in her memorandum that the RAD [translation] "has jurisdiction to hear appeals *de novo*" and has no other choice than to make its own assessment of her credibility. She states, however, that the RAD [translation] "has jurisdiction in an appeal according to the rules of an erroneous decision" and further that "the concept of deference does not apply to the RAD, let alone to the point of applying palpable and overriding error…."

[18] I do not agree with the appellant's submissions on this point.

[19] The Federal Court, which has the authority to review RAD decisions, has rendered a few decisions to date regarding the standard of review or intervention the RAD should apply or its role when RPD decisions are appealed to it.

[20] In *Alvarez*[1] and *Eng*,[2] both rendered on July 17, 2014, the Honourable Justice Shore of the Federal Court of Canada has ruled on this matter.

[21] At paragraphs 28 and 29 of *Alvarez* and paragraphs 29 and 30 of *Eng*, the Court states as follows:

> [28] Parliament conferred a true appellate function on the RAD, a specialized (if not overspecialized) tribunal, which sits on appeal of the decisions of another

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1 *Alvarez v. M.C.I.* 2014 FC 702.

2 *Eng v. M.C.I.* 2014 FC 711.

> administrative tribunal. Contrary to a court exercising a superintending and reforming power over public bodies, the RAD's primary responsibility is to ensure the integrity and consistency of proceedings before the RPD and to reduce needless duplication of proceedings (including before the Federal Court). When analyzing a decision of the RPD, the RAD must not merely determine whether it was made in a reasonable manner, but, rather, analyze whether the RPD relied on a wrong principle of law or misassessed the facts to the point of making a palpable and overriding error (*Housen*, above).
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> [29] "Palpable and overriding error" is often used interchangeably with the "clearly wrong" or "unreasonable" decision test. However, this is the appellate-level standard of intervention that a specialized appeal tribunal such as the RAD must apply when reviewing a decision and not the judicial review standard of reasonableness. Even though there are similarities, these standards are different.

[22] The Court adds the following at paragraph 33 of *Alvarez* and paragraph 34 of *Eng*:

> [33] The Court agrees that the RPD, as the tribunal of first instance, is owed a measure of deference with regard to its findings of fact, and of fact and law. The RPD is better situated to draw such conclusions as it is the tribunal of first instance, the trier of facts, having the advantage of hearing testimony *viva voce* (*Housen*, above). However, the RAD must nonetheless perform its own assessment of all of the evidence in order to determine whether the RPD relied on a wrong principle of law or misassessed the facts to the point of making a palpable and overriding error. The idea that the RAD may substitute an original decision by a determination that should have been rendered without first assessing the evidence is completely inconsistent with the purpose of the IRPA and the case law dealing with the virtually identical wording of subsection 67(2). The Court finds that the RAD misinterpreted its role as an appeal body in holding that its role was merely to assess, against a standard of reasonableness, whether the RPD's decision is within a range of possible, acceptable outcomes.

[23] In a decision rendered on August 22, 2014, in *Huruglica*,[3] the Honourable Justice Phelan of the Federal Court examines the role and functions of the RAD and writes the following:

> [44] Subject to specific language, the need for deference, for example, is less compelling between the RAD and the RPD than it is between the judiciary and the executive. The relationship is more akin to that between a trial court and an appellate court but further influenced by the much greater remedial powers given to the appellate tribunal.
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> [45] Therefore, a standard of review analysis is not an appropriate analytical approach.…

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3 *Huruglica v. M.C.I.* 2014 FC 799.

[24] In considering the RAD's authority under subsection 111(1) of the IRPA to substitute a determination that "in its opinion, should have been made," Justice Phelan writes:

> [47] Unlike judicial review, the RAD, pursuant to subsection 111(1)*(b)*, may substitute the determination which "in its opinion, should have been made". One precondition of exercising this power is that the RAD must conduct an independent assessment of the application in order to arrive at its own opinion. It is not necessary, in order to trigger this remedial power, that the RAD must find error on some standard of review basis.
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> [48] The restriction on the ability to receive fresh evidence is not a bar to conducting a *de novo* appeal.…

[25] Justice Phelan finally concludes:

> [54] Having concluded that the RAD erred in reviewing the RPD's decision on the standard of reasonableness, I have further concluded that for the reasons above, the RAD is required to conduct a hybrid appeal. It must review all aspects of the RPD's decision and come to an independent assessment of whether the claimant is a Convention refugee or a person in need of protection. Where its assessment departs from that of the RPD, the RAD must substitute its own decision.
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> [55] In conducting its assessment, it can recognize and respect the conclusion of the RPD on such issues as credibility and/or where the RPD enjoys a particular advantage in reaching such a conclusion but it is not restricted, as an appellate court is, to intervening on facts only where there is a "palpable and overriding error".

[26] In *Spasoja*,[4] rendered on September 23, 2014, the Honourable Justice Roy of the Federal Court also addresses the role of the RAD.

[27] In that case, the Court first found, in line with the previous decisions in *Huruglica*, *Eng* and *Alvarez*, that the RAD erred in applying the standard of reasonableness rather than conducting an independent assessment of the refugee protection claim (paragraph 12).

[28] The Honourable Justice Roy proceeds with a detailed analysis of the statutory provisions relating to the RAD in the IRPA; of the case law pertaining to the role of an appellate body within an administrative tribunal, specifically *Parizeau*;[5] and Parliament's intent as stated by various stakeholders during debates about the RAD before the parliamentary committee of the

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4 *Spasoja v. M.C.I.*, 2014 FC 913.

5 *Parizeau v. Barreau du Québec*, 2011 RJQ 1506.

House of Commons to determine that the appeal referred to in sections 110 and 111 of the IRPA cannot be equated to a judicial review but, rather, to an appeal in its own right (paragraph 39).

[29] Relying on the conclusions in *Parizeau* regarding the standard of review to be applied by an appellate tribunal, and distinguishing himself from his colleague who rendered the Court's decision in *Huruglica*, the Honourable Justice Roy concludes that the standards of review applicable to the RAD are correctness for questions of law and palpable and overriding error for questions of fact and questions of mixed law and fact. In addition, the RAD must show deference to the RPD's findings regarding the credibility given to the witnesses heard before it (paragraphs 39, 40 and 46).

[30] The Honourable Justice Roy also states that he could not find any indicators providing for an appeal *de novo* (paragraph 42) and writes in the following paragraph of his decision that:

> [43] Instead, the scheme under review addresses appeals on specific questions, be it of fact, of law or of mixed law and fact (subsection 110(1)). In my view, that means that the appellant must identify the questions on which the appeal will focus. It will be on the basis of the record of proceedings before the RPD that the appeal will be heard based on the questions identified and raised, subject to the documentary evidence (subsection 110(3)) or evidence that is consistent with subsection 110(4).

[31] Finally, in a decision rendered on October 8, 2014 (*Alyafi v. M.C.I.* 2014 FC 952), the Honourable Justice Martineau of the Federal Court, having reviewed the aforementioned decisions, first concludes that they all reject the reasonableness standard of review. He then states that the RAD should be allowed to choose between the two remaining approaches: the one set out in *Eng*, *Alvarez* and *Spasoja*, which is the standard of palpable and overriding error, and the one set out in *Huruglica*, which he describes as a "composite and variable standard of review resulting from the nature of the claim before the RAD—characterized as hybrid appeal—and the particular nature of questions of fact, or of mixed fact and law, raised by an appellant" (paragraph 16).

[32] Justice Martineau writes the following at paragraph 46 of *Alyafi*:

> [46] … I chose the middle path, that of wisdom: allow the RAD to apply the second or third approach as long as the question of the scope of the appellate review of the RPD's decisions has not been settled by a final judgment by the Federal Court of Appeal or the Supreme Court of Canada. Quite simply.

[33] Consequently, I am of the opinion that it is preferable for the RAD to apply the principles established in *Spasoja* because, with respect, the role of the RAD described therein appears to me to be more easily applicable than the one described in *Huruglica*, particularly when, as is the case here, no new evidence was filed with the RAD and no hearing was held before it.

[34] In this case, I am of the opinion that the error the appellant alleged regarding the RPD's assessment of her identity, and therefore her credibility, is one of fact, and consequently I will apply the standard of palpable and overriding error.

[35] I will review and conduct my own analysis of all the evidence presented to the RPD, including listening to the recording of the hearing held before the RPD, to determine whether the RPD committed one or more palpable and overriding errors.

[36] At paragraph 91 of *Parizeau*, a palpable and overriding error is described as follows:

> [translation]
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> [91] …A palpable and overriding error is an error that, in its undeniability—and therefore not a difference of opinion on the assessment of the evidence—determines the outcome of the dispute in that the conclusion of the trier of fact, that is, the result of his or her decision, cannot hold water, thus, ipso facto, making the decision unreasonable.

ANALYSIS

[37] The issue here is whether the RPD erred in its assessment of the identity, and therefore the credibility, of the appellant.

[38] The appellant first submits that the RPD should not have accepted as evidence the documents filed by the Minister because they do not comply with paragraph 34(3)(*a*) of the *Refugee Protection Division Rules* (RPD Rules), which requires a party to provide any document at least 10 days before the date fixed for the hearing. In my opinion, however, the RPD did not err in accepting the documents into evidence, mainly because, as heard in the hearing recording, the documents were relevant and important. Not only is the RPD not bound,

in general, by the strict rules of evidence and procedure, but, in addition, it had the authority to accept these documents under rule 36 of the RPD Rules.

[39] Furthermore, I would add that it appears to me rather paradoxical that the appellant or her counsel would oppose the filing of documents by the Minister because they were filed late when her own documents were also filed late on November 27, 2014, for a hearing scheduled for December 1, 2014, breaching not only rule 34 of the Rules, but also rule 9 of the Rules regarding changes to the BOC Form.

[40] The appellant then argues in her memorandum that the RPD did not assess the credibility of her testimony as it pertains to her identity.

[41] I do not agree with the appellant's claim. It appears to me upon reading the RPD's reasons that it, on the contrary, examined, directly or implicitly, the credibility of the appellant's testimony, which was assessed taking into account the documentary evidence filed.

[42] On page three of its decision, the RPD is of the opinion that the appellant's explanation to justify her seeking asylum in Belgium under a false identity—because she apparently had a false passport—is not reasonable. I agree with the following conclusion by the RPD: In my opinion, having a false passport in one's possession does not justify lying to Belgian authorities about her identity. In addition, it seems that the appellant never revealed what she claims to be her true identity to the Belgian authorities, even after having stayed there for approximately seven years.

[43] The RPD further concludes that the appellant first lied to Canadian authorities upon her arrival, in omitting the material fact that she had stayed in Belgium from 2007 to 2014, and that this undermines her overall credibility. Once again, I agree with this RPD finding. Furthermore, I am of the opinion that the appellant also lied to medical workers she met in Canada, as per two medical documents she herself submitted into evidence before the RPD. The first letter, from the PRAIDA organization and signed by a social worker (see page 203 of the RPD record), indicates that the appellant was kicked out by her family in the DRC because of her homosexuality, contrary to the appellant's claims in her amended BOC Form that her father tried to protect her and that the reason she left the DRC was first and foremost political. The

second letter (see page 205 of the RPD record), from a doctor, reports facts that are a [translation] "mix" of the appellant's two stories: that she was allegedly raped in 2011 and that she apparently had political problems before fleeing to Brazzaville and then Canada, omitting her entire stay in Belgium in particular.

[44] The RPD then concluded that the appellant's credibility is undermined by the fact that documents sent to the appellant by a person who is apparently her aunt's friend are addressed to the name XXXX, the name under which the appellant requested asylum in Belgium and which is apparently not truly her name. The appellant provides no explanation for this except to state that she is surprised and that it is a mistake. I once again agree with this RPD finding. The fact that an envelope was sent to the appellant under the name she apparently used in Belgium adds further confusion to her claims and can only undermine her credibility.

[45] I therefore find that the RPD did truly examine the credibility of the appellant's testimony and found that she is not credible. I agree with that finding.

[46] The appellant next claims that the RPD erred in failing to consider the school documents she submitted as evidence to establish her identity. Once again, I cannot accept this claim by the appellant.

[47] On page four of its reasons, the RPD addresses the diploma the appellant submitted as Exhibit P-5 (see page 189 of the RPD record) and assigns it no weight with respect to her identity because no given name is written on the document and the photograph on the document, which is covered in ink, does not allow for the identification of the appellant. I find, as did the RPD, that given the issues with the credibility of the appellant's testimony and given the inherent problems with the document, there is no cause to give the document probative value as to the appellant's identity.

[48] In its reasons, the RPD then addresses the two report cards submitted as Exhibit P-9 (see pages 193 and 194 of the RPD record) and gives them no probative value because there is no given name written on the documents and no photograph is attached, even though there is a space reserved for a photograph in the second of these documents. Once again, I am of the opinion that there is no cause to give probative value to these documents as to the appellant's

identity considering the absence of a given name and photographs that would connect them to the appellant.

[49] The RPD then finds that there is no cause to give probative value to the driver's licence and voter's card that were examined by the Minister's experts (see pages 136 to 144 of the RPD record), without consideration for these expert assessments, because these two documents were issued in 2011 when the appellant was apparently not in the DRC and because she does not know who signed the driver's licence or whose fingerprint appears on the voter's card.

[50] I agree with the RPD's findings on this point. In my opinion, there is no cause to give probative value to these documents, which were allegedly issued when the appellant had been out of the country since 2007 and that apparently contain a signature or a fingerprint of unknown origin. I would add that it is relevant to note in this analysis that the expert assessment revealed that these two documents are not genuine, even if the appellant was not able to question the expert. Neither the RPD nor the RAD is bound by the strict rules of evidence and procedure, and I am of the opinion that a certain probative value can be given to the expert assessments when the source, here the CBSA, is known. The fact that these reports were not submitted at the appellant's detention reviews before the RPD Immigration Division, as the appellant claims in her memorandum, is not, in my opinion, relevant here, and the doubts she raises regarding the expert's competency are not, in my opinion, supported by any evidence here.

[51] With respect to the appellant's identity, the RPD does not give any probative value to the statements from the basketball team either (exhibits P-6 and P-8) given that these are not identity documents in and of themselves and that their source is not reliable, considering the appellant's testimony that the basketball association procured a false passport for her.

[52] I fully agree with these RPD findings. I would add that, in my opinion, the first of these documents, Exhibit P-6, lists the holder's year of birth as 1977, while the appellant declares at question 1c) on her BOC Form that her year of birth is 1980. The second document, Exhibit P-8, indicates that the appellant [translation] "…was the captain of the team from

October 2010 to February 2011," a period during which the appellant alleges having been in Belgium.

[53] Finally, the RPD gives no probative value to the three documents that were allegedly issued by the civil registry in the commune of Ngaliema in Kinshasa—the nationality certificate (Exhibit P-3, page 196 of the RPD record), the birth certificate (Exhibit P-10, page 195 of the RPD record) and the certificate of family composition (Exhibit P-7, page 191 of the RPD record)—mainly because these documents all contain a misspelling of the last name, "XXXX" instead of "XXXX," which the appellant claims is her name.

[54] I am also of the opinion that there is no cause to give probative value regarding the appellant's identity given the misspelling mentioned above. I would add that these documents were issued after the appellant's arrival in Canada, and therefore she never had them in her possession, and that none of these documents contain a photograph that would connect them to the appellant.

[55] Finally, I would add that other documents on the record concerning the appellant appear, at first glance, to be false, which in my opinion adds to the appellant's lack of credibility. These documents include two medical certificates seized by the CBSA (pages 88 to 90 of the RPD record) that indicate that one XXXX XXXX was allegedly raped and for this reason was a patient at a clinic since XXXX XXXX, 2011, a time when the appellant claims to have been in Belgium.

[56] For all the reasons above, and after having analyzed all the evidence submitted, taking into account the RPD's decision and the errors listed in the appellant's memorandum, I conclude that the appellant has not demonstrated that the RPD committed an error in its decision that would justify the RAD's intervention.

REMEDY

[57] For these reasons, I confirm the determination of the RPD, namely, that XXXX XXXX XXXX is not a "Convention refugee" under section 96 of the IRPA or a "person in need of protection" within the meaning of section 97 of the IRPA.

[58] The appeal is dismissed.

Normand Leduc

Normand Leduc

October 5, 2015

Date

IRB translation
Original language: French