

Federal Court



Cour fédérale

Date: 20160210

Docket: IMM-2160-15

Citation: 2016 FC 161

Ottawa, Ontario, February 10, 2016

PRESENT: The Honourable Mr. Justice Southcott

BETWEEN:

**TAMAR WILLIAMS (a.k.a TAMARA
WILLIAMS)**

Applicant

and

**THE MINISTER OF CITIZENSHIP AND
IMMIGRATION**

Respondent

JUDGMENT AND REASONS

[1] This is a judicial review of a decision of the Refugee Appeal Division [RAD] dated April 17, 2015, wherein the RAD confirmed the decision of the Refugee Protection Division [RPD] determining that the Applicant is not a Convention refugee pursuant to section 96 of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA] nor a person in need of protection pursuant to section 97 of IRPA.

[2] For the reasons that follow, this application is allowed.

I. Background

[3] The Applicant is a citizen of Jamaica. She alleged before the RPD that she began a relationship with a man in Jamaica in early 2009. When she attempted to end the relationship in August 2009, her boyfriend did not accept this and threatened to kill her. The Applicant states that she went to the police but did not receive protection.

[4] Shortly after this incident, the Applicant travelled to Canada to participate in the farm workers program and returned to Jamaica following the completion of her contract. She participated in this program for three years, returning to Jamaica at the end of each contract. During this time, she saw her ex-boyfriend only once, in January 2012, and did not interact with him.

[5] The Applicant alleges that in February 2014, she was assaulted by her ex-boyfriend, who told her that she could not run from him and that he would come to her house and throw acid on her face. She states that she went to the police but nothing was done. The Applicant returned to Canada in April 2014 and, while in Canada, she found out in September 2014 that her ex-boyfriend had begun to harass her son. At this point, she began to inquire into receiving help with her situation, following which she made a refugee claim at the end of September 2014.

II. RPD Decision

[6] The Applicant's refugee claim was heard by the RPD on December 12, 2014. The RPD rejected her claim. Based on negative credibility findings and the Applicant's demonstrated lack of subjective fear, the RPD was not satisfied that the events occurred as she alleged and concluded that she did not have a well-founded fear of persecution. Its findings included the following:

- A. The Applicant omitted significant information from her Basis of Claim form [BOC] including a punch to the face during the incident in February 2014, her consultation with a friend who was a police officer (Officer Bailey) following that incident, and the details of the response she received when she approached the police in 2009 and 2014;
- B. The Applicant's testimony was not credible because of her inability to recall the specific dates associated with the duration of her relationship and the incidents in 2009 and 2014;
- C. Inconsistencies between the Applicant's testimony and a letter submitted by Officer Bailey undermined the credibility of that letter; and
- D. The Applicant's re-avilment to Jamaica and her delay in filing her refugee claim demonstrated a lack of subjective fear.

III. RAD Decision

[7] The RAD followed *Huruglica v Canada (Minister of Citizenship and Immigration)*, 2014 FC 799 [*Huruglica*] in identifying the relevant standard of review. It stated that it would conduct its own assessment of whether the Applicant was a Convention refugee or a person in need of protection. Deference would be afforded to the credibility findings of the RPD or to other findings where the RPD had a particular advantage in reaching its conclusions.

[8] The RAD was not persuaded by the Applicant's submission that the RPD erred in rejecting her explanation regarding the omission in her BOC of the punch to the face in the 2014 incident. It concluded that it was reasonable to expect significant details of the incident to be recalled and recorded in the BOC, particularly as the allegation that her boyfriend assaulted her was a central allegation that went to the heart of her claim. Further, the BOC was completed long after the incident and with help from counsel.

[9] As to the RPD's adverse credibility finding based on the Applicant's failure to include in her BOC her consultation with Officer Bailey, the RAD found it was open to the RPD to reject the Applicant's explanation that she was unaware she could do this and was confused because of the situation with her son. The RAD found that this was a significant omission relevant to her allegation that she could not obtain state protection.

[10] In relation to the Applicant's inability to provide key dates regarding the incidents, the RAD reviewed the recording of the RPD hearing and found it unreasonable that she could not

recall these dates. The Applicant also argued that the RPD erred in its interpretation of the police response to these incidents. However, the RAD noted that she did not provided any detail surrounding the error and, after conducting its own assessment of the RPD's reasons, the RAD did not find any error.

[11] The RAD agreed with the Applicant that the inclusion of Officer Bailey's badge number in his letter when he was writing as a private citizen did not detract from the credibility of the letter. However, the RPD was still justified in giving little weight to the letter as it lacked detail and was inconsistent with the testimony.

[12] The RAD also found that the RPD made an improper credibility finding based on her description of her interaction with the police following the encounter with her ex-boyfriend lacking in detail when compared to her testimony. The RAD concluded that the testimony was an elaboration of the content of her BOC and not an omission of details. Notwithstanding this finding, the RAD found that when the BOC and testimony in this area were assessed, they provided insufficient evidence to offset the cumulative adverse credibility findings.

[13] On re-availment and delay in claiming refugee status, the RAD found it reasonable to expect that, if the Applicant truly feared returning to Jamaica, she would have made some effort to seek protection or at least inquired as to what protection might be available. Additionally, her decision to wait four months upon arrival in Canada in 2014 before pursuing her claim did not reflect a person who was truly fearful for her safety and that of her son.

[14] With respect to state protection, the RAD in reviewing the record agreed with the findings of the RPD that the events for which the Applicant alleged she required state protection did not occur.

IV. Issues and Standard of Review

[15] Neither party takes issue with the standard of review adopted by the RAD to govern its consideration of the RPD's decision. The parties also agree that this Court's review of the RAD's own findings in this matter should be conducted based on a standard of reasonableness. I concur (see *Siliya v Canada (Citizenship and Immigration)*, 2015 FC 120).

V. Submissions of the Parties

A. *The Applicant's Position*

[16] The Applicant submits that the RAD's credibility determinations are unreasonable for several reasons.

[17] While the word "punch" does not appear in the BOC, it did refer to the Applicant being attacked and receiving bruises on her face and arm during the February 2014 incident. She submits that the only possible interpretation of the passage from the BOC is that the ex-boyfriend caused these bruises, whether through a punch or some other form of assault.

[18] The Applicant argues that her interaction with Officer Bailey was a chance encounter following the assault and not a central component of her allegation of a lack of state protection and that no negative inferences should be drawn from its omission from the BOC.

[19] The Applicant also submits that the RAD unreasonably expected her to recall exact dates for incidents taking place prior to the RPD hearing and argues that, absent any document that contained such dates, a refugee claim should not be determined on the basis of a memory test (*Sheikh v Canada (Minister of Citizenship and Immigration)*, 190 FTR 225 at para 28).

[20] With respect to re-availment, the Applicant's position is that the RAD failed to consider her explanation that she had come to believe that her ex-boyfriend was no longer interested in her prior to the February 2014 incident and that, even following her arrival in Canada in April 2014, she had valid temporary resident status and her ex-boyfriend had not yet approached her son.

[21] Finally, the Applicant submits that it was only on the basis of the cumulative sustained credibility findings that the RAD upheld the RPD's decision. Therefore, even if the Court accepts only some of the alleged credibility errors, the Court's intervention is warranted.

B. *Respondent's Position*

[22] The Respondent submits that the RAD reasonably reviewed the credibility evidence to the extent necessary to address the Applicant's arguments, while paying deference to the original RPD findings of fact related to the Applicant's *viva voce* testimony.

[23] The Respondent's position is that a punch to the face is not a minor fact or one that represents mere elaboration on what had been included in the BOC. It was reasonable of the RAD to have expected the Applicant to mention such a key detail in her BOC, given that her claim is based on her ex-boyfriend's pursuit of her.

[24] With respect to Officer Baily, the Respondent argues that, given he is a police officer and someone familiar with the Applicant's situation as well as country conditions, his advice to the Applicant speaks to the availability of state protection. As such, neither the RPD nor the RAD erred when they held the Applicant's omission of this was significant. The Respondent draws an analogy to *Wong v Canada (Citizenship and Immigration)*, 2008 FC 534 at para 8 [*Wong*].

[25] The Respondent submits that there is nothing improper about the RPD and the RAD making negative credibility findings about the Applicant's inability to provide dates for any of the key events that gravely impacted her life and precipitated her claim.

[26] With respect to re-availment, the Respondent's position is that the Applicant's actions are incongruent with her testimony that she feared for her life when she left Jamaica in 2009. She also hid at her mother's home in Jamaica, a place known to her ex-boyfriend, both in 2009 and when the problems recurred in February 2014, and inconsistently testified that she was planning to "ask around and see what could be done" upon arriving in Canada in April 2014, even though she did not ultimately claim until September 2014.

[27] Finally, the Respondent submits that, when a credibility finding is based on a number of points as it is in this case, the Court's analysis should not involve determining whether each point meets the reasonableness test. Rather, the assessment of reasonableness should be holistic. In oral argument, the Respondent responded to the Applicant's arguments on challenged findings and also relied on other findings by the RAD, which have not been challenged, as part of the overall support for the decision that should be taken into account by the Court.

VI. Analysis

[28] The Applicant's claim turns on the events that occurred in 2014. Her position is that it was the alleged assault in February 2014 and her ex-boyfriend's subsequent approach of her son in September 2014 that prompted her claim. My decision to allow this application turns on the RAD's findings with respect to the omission of the punch to the face from her BOC and her re-availment and delay in claiming, all of which are central to the 2014 events upon which her claim is based.

[29] With respect to the omission from her BOC of the reference to being punched in the face, I agree with the Applicant's position that the RAD erred in upholding the RPD's adverse credibility finding. The RAD's analysis focuses on the Applicant's explanation for this omission, related to confusion and stress, and notes that the BOC was completed long after the alleged assault, with the benefit of counsel, and that the BOC instructions refer to the requirement for detailed explanations. The RAD therefore agrees with the RPD that the Applicant should have included this important information in her BOC and that its omission undermines her allegation as to the February 2014 assault.

[30] However, as noted by the Applicant, neither the RAD nor the RPD refer to the actual content of the BOC, to assess whether its content can appropriately be characterized as an omission of this information. In referring to the February 2014 incident, the BOC states that her ex-boyfriend “attacked” her and that, when she went to the police, she “showed them the bruises on my face and arm”. While there is not an explicit reference to a punch, the content of the BOC clearly identified that her ex-boyfriend assaulted the Applicant in a manner which caused injury to her face. I cannot conclude that the failure to refer to the attack as consisting of a punch to be the sort of omission that justifies making an adverse credibility finding.

[31] The Respondent cites authorities for the entitlement of a decision-maker in a refugee claim to consider the applicant's failure to mention important facts central to the claim. However, these cases relate to omissions that are significantly different than in the case at hand. For instance, in *Khalifa v Canada (Minister of Citizenship and Immigration)*, 2004 FC 369, the omissions were references to two arrests, which the Court noted were not minor or elaborative details, but were related to facts critical to his refugee claim. In *Kosmacaj v Canada (Minister of Citizenship and Immigration)*, 2005 FC 52, the omissions were particular political activities and an incident of alleged torture. In *Karaoglan v Canada (Citizenship and Immigration)*, 2008 FC 749, at paragraph 16, the Court draws the distinction between omissions which undermine the credibility of later embellishments of a refugee claim and omissions of minor or elaborative details that do not permit the drawing of adverse inferences.

[32] In the context of the information that was included in the Applicant’s BOC related to the February 2014 incident, I would consider her subsequent testimony that she was punched in the

face by her ex-boyfriend to constitute an elaborative detail that does not allow for an adverse credibility finding. Particularly given that the RAD does not refer to the content of the BOC so as to consider whether the omission is the sort that can permit an adverse inference, my conclusion is that the RAD made an unreasonable finding regarding this omission.

[33] The other area in which I find the RAD's decision unreasonable is its analysis of the Applicant's re-availment and delay in asserting her claim.

[34] The RAD drew an adverse inference, found that the Applicant lacked subjective fear, and concluded her allegations of fear in Jamaica to be further undermined, based on her repeated returns to Jamaica between 2009 and 2014 following her Canadian work terms and the cumulative effect of the delay in asserting a claim upon returning to Canada in 2014. However, as submitted by the Applicant, while the RAD is permitted to draw an adverse inference based on such re-availments or delays, in doing so it must take into account any explanation offered by the claimant (see *Sanchez Hernandez v Canada (Minister of Citizenship and Immigration)*, 2012 FC 197, at paras 21-23; and *Pulido Ruiz v Canada (Minister of Citizenship and Immigration)*, 2012 FC 258, at para 57).

[35] The Applicant's explanation for returning to Jamaica between 2009 and 2014 was that she did not see her ex-boyfriend when she returned home and therefore thought that he had accepted the fact that the relationship was over. Effectively, her position appears to be that the fear she developed following the initial incident in 2009 did not persist through the 2009-2014

period. With respect to her delay in asserting her claim in 2014, her explanation was that it was only after her son was threatened in September of 2014 that she sought protection.

[36] The Respondent notes that the RAD did refer in its decision to the Applicant's explanation for the delay in 2014. However, as argued by the Applicant, the RAD's decision does not contain any consideration of this explanation. It simply states that it is not persuaded by the Applicant's argument and subsequently finds that her decision to wait nearly four months before making her claim is not the action of a person who is truly fearful for her safety and that of her son. In response to this point, the Respondent argues that the Court can have recourse to the analysis of the RPD, as the RAD referred to the RPD's findings, including that the Applicant failed to file a claim for refugee protection immediately upon arrival in Canada, and stated that it supports the RPD's findings.

[37] I have some difficulty with this proposition. As noted by the RAD, the standard of review it adopted based on *Huruglica* requires it to conduct its own assessment of whether the Applicant was a Convention refugee or a person in need of protection. It would therefore be difficult to sustain the RAD's decision based on an analysis conducted by the RPD, unless the RAD's decision demonstrates the required independent assessment of that aspect of the claim.

[38] Regardless, the portion of the RPD's decision to which the Respondent referred the Court is not an analysis of the Applicant's explanation that she did not assert her claim until September 2014 when her son was threatened. Rather, the Respondent pointed to the RPD's statement that it is odd that the letter from the Applicant's mother, which formed part of the evidence in support

of her claim, was silent about her son being harassed by the ex-boyfriend since the Applicant's most recent departure. The RPD decided to give little weight to this letter. While this finding rejects certain evidence that corroborates the Applicant's claim that her son was harassed, it cannot be characterized as an analysis of the Applicant's explanation for her delay in asserting her claim. Much less does it present a basis to conclude that the RAD, in supporting the RPD's findings, conducted the required independent analysis of this explanation.

[39] The Applicant is also correct that the RAD's decision contains no analysis of the Applicant's explanation for returning to Jamaica between 2009 and 2014. The RAD was required to consider this explanation in reaching its decision on re-availment, and its failure to do so makes that portion of the decision unreasonable.

[40] It is unnecessary for me to rule upon all the arguments raised by the Applicant in challenging other findings of the RAD, as I consider the errors with respect to the omission in the BOC and the re-availment and delay analysis to require that this application be allowed. I am conscious of the Respondent's argument that the decision should be reviewed holistically and should be sustained based on other findings, even if some of the Applicant's argument were to succeed. To the opposite effect, the Applicant notes the following conclusion by the RAD at paragraph 48 of its decision:

“... the RAD finds after its review of all of the evidence in the record that the **cumulative** sustained adverse credibility findings and the demonstrative lack of evidence of subjective fear identified by the RPD are sufficient to confirm the RPD's overall determination.” [emphasis added]

[41] Based on this conclusion, the Applicant cites *Qalawi v Canada (Citizenship and Immigration)*, 2007 FC 662, at paragraph 17, for the following resulting proposition:

“[17] I am satisfied that a number of the Board’s negative credibility findings were not patently unreasonable. However, given the Board’s statement that it was the cumulative effect of all of the negative findings that led to its conclusion that Mr. Qalawi’s overall story was not credible, it is not possible to ascertain what effect the findings that I have found to have been made in error would have had on the Board’s analysis and on its ultimate conclusion.”

[42] I would not be prepared to adopt an immutable principle that a statement of this sort, that a decision is based on cumulative findings, results in the decision automatically being set aside if any of those findings are successfully challenged. However, in the case at hand, I consider the findings related to the BOC omission and re-availment and delay, relating as they do to the events of 2014 upon which the claim turns, to be sufficiently fundamental to the Applicant’s credibility and subjective fear that the successful challenge of those findings requires the RAD’s decision to be set aside as unreasonable. While not dependent on it, this conclusion is supported by the “cumulative findings” language in the decision, as this is a case where I would be unable to determine how the RAD would have decided the appeal before it had it not been for the findings that I have set aside.

[43] Neither party proposed any question of general importance for certification for appeal.

JUDGMENT

THIS COURT'S JUDGMENT is that this application for judicial review is allowed and the matter is referred to the Refugee Appeal Division for re-determination by a different panel member. No question is certified for appeal.

“Richard F. Southcott”

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: IMM-2160-15

STYLE OF CAUSE: TAMAR WILLIAMS (a.k.a. TAMARA WILLIAMS) V
THE MINISTER OF CITIZENSHIP AND
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