Federal Court  Cour fédérale

Date: 20170501

Docket: IMM-3901-16

Citation: 2017 FC 433

Ottawa, Ontario, May 1, 2017

PRESENT: The Honourable Mr. Justice Gascon

BETWEEN:

SHIROMI HETTI ARACHCHILAGE

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

and

THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS

Respondents

JUDGMENT AND REASONS

I. Overview

[1] The applicant, Mrs. Shiromi Hetti Arachchilage, is a citizen of Sri Lanka. In April 2011, she left her country of origin. She first stayed in Israel for two years before coming to Canada in

May 2013, after obtaining a work permit to be employed in a seafood-packing plant. In March 2015, after becoming unemployed, she made a refugee claim, alleging that she was in danger because both her husband, a soldier in the Sri Lankan army, and the Sri Lankan authorities suspected her of supporting the Liberation Tigers of Tamil Eelam [LTTE]. She claimed that she was a victim of domestic violence, had been detained by the Sri Lankan army in 2011, and was threatened and sexually assaulted while in detention.

[2] In January 2016, Mrs. Arachchilage's refugee claim was denied by the Refugee Protection Division [RPD] of the Immigration and Refugee Board of Canada, as the RPD did not find Mrs. Arachchilage credible. Mrs. Arachchilage appealed the RPD decision to the Refugee Appeal Division [RAD]. In March 2016, the RAD confirmed the RPD decision and found that Mrs. Arachchilage was not a Convention refugee nor a person in need of protection pursuant to sections 96 and 97 of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA].

[3] Mrs. Arachchilage has applied to this Court for judicial review of the RAD's decision. She argues that the decision is unreasonable because the RAD erred in its treatment of the corroborative evidence, in blindly adopting the RPD's credibility findings and in failing to apply the Immigration and Refugee Board's *Chairperson Guidelines on Women Refugee Claimants Fearing Gender-Related Persecution* [the Gender Guidelines]. She asks this Court to quash the RAD's decision and to order that a different panel reconsider her appeal of the RPD decision.

[4] For the reasons that follow, I conclude that the RAD's decision is unreasonable as its treatment of one of the corroborative evidence, namely a medical note relating to the sexual

assault suffered by Mrs. Arachchilage in 2011, was erroneous and ill-founded. While this was only one of many elements considered by the RAD in its decision, it was so central to Mrs. Arachchilage's refugee claim that it suffices, in my opinion, to push its overall conclusion beyond the range of possible, acceptable outcomes based on the facts and the law, and to justify this Court's intervention. I must, therefore, allow this application for judicial review and send the matter back for redetermination.

[5] Even though Mrs. Arachchilage presented other issues in support of her challenge of the RAD's decision, the RAD's treatment of the medical note is determinative and is therefore the sole issue that I need to address in considering this application for judicial review.

II. Background

A. *The RAD's decision*

[6] In its decision, the RAD started by reviewing the RPD's decision and findings. As Mrs. Arachchilage claimed that the RPD erred in its credibility finding and its assessment of corroborative evidence, the RAD reviewed more specifically a Justice of the Peace's letter from Sri Lanka, a letter from Mrs. Arachchilage's brother and a medical note.

[7] The medical note came from a gynecologist at the Nawaloka Hospital in Sri Lanka, and stated that Mrs. Arachchilage was "treated for sexual assault" in January 2011. In its analysis, the RAD raised concerns with the fact that the note was written in May 2015, whereas the sexual assault it referred to occurred in January 2011. As the medical note simply briefly stated that

Mrs. Arachchilage was treated for sexual assault, the RAD found that a "physician would treat for whatever was complained about", and that the document did not amount to actual evidence that Mrs. Arachchilage was sexually assaulted. The RAD found that the medical note did not provide any detail as to who assaulted Mrs. Arachchilage, or on "whether she actually had been sexually assaulted or was only treated for sexual assault". The RAD thus found that the note had no probative value.

[8] I add that the RAD also discussed the Gender Guidelines in its reasons, as Mrs. Arachchilage claimed that the RPD had not shown sensitivity in concluding that the events she described did not occur. The RAD concluded that the RPD stated in clear terms why it did not believe Mrs. Arachchilage's allegations relating to her gender. The Gender Guidelines exist to ensure that gender-based claims are heard with sensitivity, and the RAD found that Mrs. Arachchilage failed to demonstrate how the RPD did not act in accordance with them. The RAD observed that the Gender Guidelines do not shield a refugee applicant from an assessment of her credibility.

[9] Overall, the RAD concluded, further to its independent assessment of the evidence, that the RPD decision was correct and maintained it.

B. ***The standard of review***

[10] It is now established law that the standard of review to be applied by this Court to a decision of the RAD or the RPD on the legal requirements under sections 96 and 97 of the IRPA is the deferential standard of reasonableness, as the RAD is thereby interpreting and applying its

constituent statute with which it has particular familiarity (*Basran v Canada (Citizenship and Immigration)*, 2015 FC 1221 at para 19; *Niyas v Canada (Citizenship and Immigration)*, 2015 FC 878 at para 23; *Ching v Canada (Citizenship and Immigration)*, 2015 FC 725 at para 45). Since *Alberta (Information and Privacy Commissioner) v Alberta Teachers' Association*, 2011 SCC 61, the Supreme Court has repeatedly stated that "when an administrative tribunal interprets or applies its home statute, there is a presumption that the standard of review applicable to its decision is reasonableness" (*Commission scolaire de Laval v Syndicat de l'enseignement de la région de Laval*, 2016 SCC 8 at para 32; *Tervita Corp v Canada (Commissioner of Competition)*, 2015 SCC 3 at para 35). This is the case here.

[11] Furthermore, assessing whether the RAD made a proper assessment of the facts and of the evidence in finding that an applicant is not a refugee is a mixed question of facts and law that also attracts the standard of reasonableness (*Dunsmuir v New Brunswick*, 2008 SCC 9 [*Dunsmuir*] at paras 47 and 53).

[12] When reviewing a decision on the standard of reasonableness, the analysis is concerned with the existence of justification, transparency and intelligibility within the decision-making process, and the decision-maker's findings should not be disturbed unless the decision does not fall "within a range of possible, acceptable outcomes which are defensible in respect of the facts and law" (*Dunsmuir* at para 47). In conducting a reasonableness review of factual findings, it is not this Court's role to reweigh the evidence or the relative importance given by the decision-maker to any relevant factor (*Kanthasamy v Canada (Citizenship and Immigration)*, 2014 FCA 113 [*Kanthasamy*] at para 99). Under a reasonableness standard, as long as the process and the outcome fit comfortably with the principles of justification, transparency and intelligibility, and

the decision is supported by acceptable evidence that can be justified in fact and in law, a reviewing court should not substitute its own view of a preferable outcome (*Newfoundland and Labrador Nurses' Union v Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62 at paras 16-17).

III. Analysis

[13] The determinative issue in Mrs. Archchilage's application for judicial review is the RAD's treatment of the medical note. To support her testimony that she was arrested and sexually assaulted by the Sri Lankan army while in detention in 2011, Mrs. Arachchilage provided a medical report from a gynecologist at the Nawaloka Hospital in Sri Lanka. In the note, the physician indicated that Mrs. Arachchilage was hospitalized for four days in January 2011 and "treated for sexual assault". The physician added that a "complete physical examination was done".

[14] It is worth citing what the RAD actually said about the medical note in its decision. The RAD wrote the following at para 13:

> The RAD has problems with the probative value of this document. In regards to being supportive evidence, it fails. It does not tell the RAD whether or not the Appellant had actually been assaulted which is a big difference from being "treated for sexual assault". In any medical facility, it would be reasonable that the physician would treat for whatever was complained about. However, the actual report may have been more forthcoming with detail based on the Appellant's discussion at the time with the doctor. This medical note does not provide any detail as to who assaulted the Appellant, whether she actually had been sexually assaulted or was only treated for sexual assault. The RAD is not finding that the medical note lacks credibility but only that it has insufficient information material to the claim, to have any probative value.

(emphasis added)

[15] Mrs. Arachchilage argues that this treatment of the medical note was unreasonable. Although the physician stated in the report that Mrs. Arachchilage was "treated for sexual assault", the RAD faults the physician for not saying "whether or not [Mrs. Arachchilage] had actually been assaulted which is a big difference from being 'treated for sexual assault'". Mrs. Arachchilage claims that this grossly minimizes her plight, and that it is completely unreasonable to give little probative value to the document because it does not provide details on her sexual assault. Mrs. Arachchilage also submits it makes a mockery of the Gender Guidelines which the RAD failed to abide by. She adds that the RAD's assumption that she was treated for a fictitious assault is nonsensical and offensive for her and for the medical professionals.

[16] I agree.

[17] I have several concerns with the RAD's findings on the medical note. First, it is trite law that documentary evidence must be used based on what it does say, not on what it does not say. A decision-maker cannot draw a negative inference based on what a document does not mention if the document is consistent with the testimony (*Arslan v Canada (Citizenship and Immigration)*, 2013 FC 252 at paras 87-88; *Pantas v Canada (Minister of Citizenship and Immigration)*, 2005 FC 64 at para 102). In addition, it is also well-recognized that, when medical issues come into play, it is unreasonable to discard as unreliable a medical note confirming some injury simply because it does not mention the cause of the injury or who is responsible for it (*Ismayilov v Canada (Citizenship and Immigration)*, 2015 FC 1013 [*Ismayilov*] at para 10; *Talukder v Canada (Citizenship and Immigration)*, 2012 FC 658 [*Talukder*] at para 12). When

asked at the oral hearing before the Court if she could direct the Court to precedents stating the opposite of this line of cases, counsel for the Minister could not point to any.

[18] I observe that the RAD took special care to mention in its decision that it was "not assessing what the note does not say but [was] assessing how, what the note does say, may or may not support the allegation". I am not persuaded by this self-serving statement. In fact, the paragraph of the RAD's decision on the medical note instead leaves the clear impression that the RAD did exactly what it says it did not do. A plain reading of RAD's discussion of the medical note reveals that the RAD solely focused on what the note did not say: the RAD gave no probative value to the document, as it found that the note did "not provide any detail as to who assaulted" Mrs. Arachchilage, and it "does not tell the RAD whether or not [Mrs. Arachchilage] had actually been assaulted" (emphasis added).

[19] Second, it is also unreasonable to expect that a medical report would go further to identify the perpetrator of an aggression or give other details on the aggression. The information about whether Mrs. Arachchilage was assaulted or who assaulted her could not have been witnessed by the physician. In *Talukder*, Madame Justice Heneghan noted that "the doctor did not witness the beating and there was no justification for diminishing the value of the note" because of the fact that he "did not mention that the injury was the result of a beating" (*Talukder* at para 12). In *Ismayilov*, Madame Justice Mactavish similarly indicated that "[g]iven that it is unlikely that the treating physicians were first-hand witnesses to his mistreatment by the police, I question whether this [the fact that it does not indicate who was responsible for his injury] was a valid reason for rejecting the evidence, as any reference in the medical reports to the individuals

responsible for the injuries would likely have been based on hearsay reports by Mr. Ismayilov himself" (*Ismayilov* at para 10).

[20] But there is more. No matter how the medical note is read, to conclude, as the RAD did, that the note "does not tell the RAD whether or not the Appellant had actually been assaulted which is a big difference from being 'treated for sexual assault'" is simply beyond understanding. This interpretation is an affront to both the evidence on the record and the basic common sense. Contrary to the RAD's allusion in its decision, the medical note did not simply state that Mrs. Arachchilage complained about or consulted for a sexual assault; it said that she was *treated* for it. If a physician reports that a person has been treated for an injury, it is plainly illogical, in the absence of any evidence pointing in that direction, to draw the inference that the injury did not necessarily occur. Being *treated* for an injury necessarily implies that an injury had occurred. Whether it is a sexual assault, a broken leg or a heart pain, if a medical report refers to someone being treated for an injury, no reasonable reading of such evidence can lead one to conclude that this person did not actually experience or suffer from such injury. Furthermore, in this case, there is no evidence disputing Mrs. Arachchilage's testimony on the occurrence of the sexual assault, and Mrs. Arachchilage was hospitalized for four days.

[21] In this case, the statement made by the RAD is not just an unfortunate choice of words or mere slip of the tongue. In a short paragraph of about ten lines, the comment was repeated twice, in the same blunt language. Twice, the RAD stated explicitly that the medical note does not tell the RAD whether or not [Mrs. Arachchilage] had actually been assaulted but only that she had been "treated for sexual assault". In a context where Mrs. Arachchilage had directly referred to

the sexual assault in her testimony, where nothing in the evidence contradicted her testimony on this specific point, and where this and the issue of domestic violence were a central element of her refugee claim, the statement made by the RAD suffices, in my view, to bring its decision beyond the scope of possible, reasonable outcomes. However large the spectrum of possible, reasonable outcomes or the margin of appreciation of the RAD can be, the RAD's finding on the medical note tumbles outside of it.

[22] The RAD's error is compounded by the fact that it is reflective of a profound disregard for the Gender Guidelines in its analysis of the medical note. It smacks of a flagrant ignorance of them. The Gender Guidelines provide a framework in the context of gender-related persecution where, for instance, sexual violence is alleged. Their purpose is "to ensure knowledgeable and sensitive consideration of the evidence of women claiming refugee status because of violence within a relationship" (*Griffith v Canada (Minister of Citizenship and Immigration)*, [1999] FCJ No 1142 (QL) at para 3). They provide that when a woman refugee claimant has suffered sexual violence, she "may require extremely sensitive handling". As a result, when a decision-maker lacks "the requisite sensitivity", it can be found that "the Gender Guidelines were not properly applied" (*Odia v Canada (Citizenship and Immigration)*, 2014 FC 663 at para 9). While I agree with counsel for the Minister that the Gender Guidelines do not call for a certain result, they nonetheless call for a certain approach. By suggesting that being treated for sexual assault leaves uncertain whether Mrs. Arachchilage was actually sexually assaulted, the RAD's conclusions remained oblivious to the teachings of the Gender Guidelines.

[23] Counsel for the Minister made a valiant effort to argue that this finding of the RAD was only one element of its analysis and that, when the decision is considered as a whole, this is insufficient, in any event, to change the ultimate outcome and to render the decision unreasonable. I disagree and do not subscribe to the Minister's suggestion that the error changes only one aspect of the numerous factors the RAD weighed in its assessment of Mrs. Arachchilage's refugee claim.

[24] I acknowledge that, under a reasonableness standard, the reasons are to be read as a whole, in conjunction with the record, in order to determine whether the reasons provide the justification, transparency and intelligibility required of a reasonable decision (*Dunsmuir* at para 47; *Agraira v Canada (Public Safety and Emergency Preparedness)*, 2013 SCC 36 at paras 51-53). I also agree with counsel for the Minister that the Court must show a high degree of deference to the RAD's assessment of the evidence and to its weighing of the various elements before it, given its specialized expertise in immigration matters. However, while a reviewing court should resist the temptation to intervene and usurp the specialized expertise that Parliament has conferred to an administrative body like the RAD, it cannot show "blind reverence" to a decision-maker's interpretation (*Dunsmuir* at para 48). This is especially true when a conclusion on a central element of a refugee claim is devoid of any support and of any logic, as is the case here.

[25] Under a reasonableness review, it is the Court's role to detect "irrationality or arbitrariness of the sort that implicates our rule of law jurisdiction", such as "the presence of illogic or irrationality in the fact-finding process" or in the analysis, or the "making of factual

findings without any acceptable basis whatsoever" (*Kanthasamy* at para 99). This will normally be exceptional but again, this is where the RAD's findings on the medical note regrettably fall in this case. Of course, a decision-maker is not required to refer to each and every detail supporting his or her conclusion. But the standard of reasonableness also requires that the findings and overall conclusion of a decision-maker withstand a somewhat probing examination (*Baker v Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817 at para 63). Where parts of the evidence are misapprehended, where the findings do not follow from the evidence and the outcome is not defensible, a decision will not withstand such probing examination. To borrow the words of the Federal Court of Appeal in *Delios v Canada (Attorney General)*, 2015 FCA 117 at para 27, the RAD's decision bears a material "badge of unreasonableness" with its erroneous finding on the medical note.

[26] I am also very mindful of the fact that a judicial review is not a "line-by-line treasure hunt for error" (*Communications, Energy and Paperworkers Union of Canada, Local 30 v Irving Pulp & Paper, Ltd*, 2013 SCC 34 at para 54), and that a reviewing court should approach the reasons with a view to "understanding, not to puzzling over every possible inconsistency, ambiguity or infelicity of expression" (*Canada (Minister of Citizenship and Immigration) v Ragupathy*, 2006 FCA 151 at para 15). Reasonableness, not perfection, is the standard. However, in this case, I do not even have to undertake any form of treasure hunting in order to find the RAD's error. The error is so patent that it jumps out of the reasons and shines by itself in broad daylight. Limited though it may be, given the central place that domestic violence and Mrs. Arachchilage's sexual assault occupied in her refugee claim, the RAD's error was enough to

infect the whole decision and to render it unreasonable. This is therefore a situation which strongly calls for this Court's intervention.

[27] I make one final observation. In *MiningWatch Canada v Canada (Fisheries and Oceans)*, 2010 SCC 2 [*MiningWatch*], the Supreme Court mentioned that "the fact that an appellant would otherwise be entitled to a remedy does not alter the fact that the court has the power to exercise its discretion not to grant such a remedy, or at least not the entire remedy sought", when the error would not have changed the result (*MiningWatch* at para 52). Even when a material error is found, if the error could have made no difference in a decision, the Court can decide to refuse to set it aside (*Canada (Minister of Citizenship and Immigration) v Patel*, 2002 FCA 55 at para 13). However, the Court's discretion must be "exercised with the greatest care", and "balance of convenience considerations" must be taken into account in the exercise of such discretion (*MiningWatch* at para 52).

[28] I do not find that this is a situation where I should exercise my discretion to refuse to send the matter back for redetermination by a different panel. True, the RAD analyzed various factors in Mrs. Arachchilage's refugee claim before upholding the RPD decision. However, its error on the medical note was an error with regard to a key element, the sexual assault at the core of Mrs. Arachchilage's complaint. It is impossible for me to determine whether, when the impact of the medical note will be properly considered by the RAD, the balancing and weighing exercise of the evidence will lead to a different conclusion on Mrs. Arachchilage's refugee claim. This is an assessment that the RAD, not this Court, must conduct and to which Mrs. Arachchilage is entitled in the fair treatment of her appeal. It is possible that, informed by these reasons of the

error committed by the RAD and of the assessment that should have been made of the medical note, another panel might nevertheless come to a similar conclusion. However, this other panel might also come to another conclusion favourable to Mrs. Arachchilage. I cannot say that the case leans so heavily against granting Mrs. Arachchilage's refugee claim that sending the matter back would serve no useful purpose (*Lemus v Canada (Citizenship and Immigration*), 2014 FCA 114 at para 38).

IV. Conclusion

[29] For these reasons, I conclude that the RAD's treatment of the medical note was unreasonable and brings the RAD's decision outside the range of possible, acceptable outcomes based on the facts and the law. I must therefore allow this application for judicial review and order another panel to reconsider Mrs. Arachchilage's appeal.

[30] Neither party has proposed a question of general importance for me to certify. I agree there is none.

JUDGMENT

THIS COURT'S JUDGMENT is that:

1. The application for judicial review is allowed, without costs.

2. The March 29, 2016 decision of the Refugee Appeal Division dismissing the appeal of Mrs. Shiromi Hetti Arachchilage is set aside.

3. The matter is referred back to the Refugee Appeal Division for re-determination on the merits by a differently constituted panel.

4. No serious question of general importance is certified.

"Denis Gascon"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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