Federal Court  Cour fédérale

Date: 20190125

Docket: IMM-1540-18

Citation: 2019 FC 112

Toronto, Ontario, January 25, 2019

PRESENT: The Honourable Mr. Justice Diner

BETWEEN:

GUSMAN CLERMONT
SHERLY CLERMONT-BLANC
MARVENS CLERMONT
ANNELYSE CLERMONT

Applicants

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Overview

[1] This application judicially reviews a decision of the Refugee Protection Division [RPD or Panel] which found that the Applicants are neither Convention refugees nor persons in need of

protection under sections 96 or 97 of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA]. For the reasons that follow, this application for judicial review is allowed.

II. Background

[2] This case concerns a family consisting of the Principal Applicant [the Applicant], his wife, and two children [collectively, the Applicants]. All are citizens of Haiti with the exception of the minor female applicant, who is a citizen of the United States. This is the second time the Applicants have sought judicial review. I will briefly summarize their story, but make no determination as to the truth of its contents.

[3] The Applicants, members of a successful family viewed as upper-middle class that has connections to and sympathizes with Western governments, have been targeted by, and fear persecution from, an organized criminal group, which they speculate to be a group called "the Chimères". Due to this perception, the Applicant's sister (Marielle), and three brothers (Jean Guibert, Fritznel, and Frantzy), have all been determined Convention refugees, and the Applicant's sister-in-law (Guerda) has joined Frantzy in Canada as his dependant.

[4] Before claiming asylum in Canada, the Applicant's brother, Frantzy, survived an attempted assassination and went into hiding. The Applicants believe that they were thereafter mistaken for Frantzy and Guerda including in an incident when the Applicant's wife was attacked and severely injured by men who beat her with iron bars. She suffered a broken ankle. Shortly after, Guerda herself survived an attack on her car when returning from driving the

Applicant's wife to get medical care. The Applicant went into hiding at a friend's house, and fled the country once his wife had received medical treatment and was able to travel.

III. Procedural history

[5] Many of the Applicants' arguments involve Frantzy's case – there, the panel accepted Frantzy's testimony, and found that while a section 96 nexus to a Convention ground could not be made due to the fact that he could not identify his persecutors, Frantzy was nonetheless a person in need of protection under section 97 of IRPA.

[6] A transcript of Frantzy's hearing, his Basis of Claim form, and personal documents filed by his Counsel for his hearing were submitted in advance of the Applicants' first hearing. However, their first claim was subsequently rejected by the panel. On judicial review, the Federal Court set aside the decision. While the Court acknowledged that every case is decided on its own merits, it found that the Applicants' faulty decision did not give reasonable justification for distinguishing the reasons in Frantzy's claim.

IV. Decision under review

[7] At the redetermination hearing, the Applicants again submitted documentary evidence, along with two prior positive decisions (Frantzy's, and another Haitian claimant decided by the same Panel member).

[8] In the January 5, 2018 redetermination decision under review [Decision] the Panel member began by acknowledging that she did not have the transcript from the first hearing before her. The Decision's two key issues were credibility and prospective risk in Haiti. The Panel found that the Applicants (i) were not credible in stating that the criminals who targeted Frantzy and assaulted the Applicant's wife, were Chimères; (ii) did not establish that the attacks on them were related to Frantzy; and (iii) could not identify the attackers for any incidents that happened between 2007 and 2016 when they fled Haiti.

[9] Additionally, the Panel distinguished the two prior positive decisions that Applicants' Counsel relied on, namely Frantzy's, and the Panel member's previous Haiti decision. Here, by contrast to those two positive Haiti decisions, the Panel found that the Applicants failed to provide a reasonable explanation for the inconsistencies between their narrative and their testimony with respect to the identity of the agents of persecution.

V. Issues and Standard of Review

[10] While the Applicants raise several arguments, in my opinion, the determinative issues are whether the Panel breached procedural fairness, and reasonably assessed the credibility of and risk to the Applicants based on past decisions.

[11] The standard of review for questions of procedural fairness is correctness (*Akram v Canada (Citizenship and Immigration)*, 2018 FC 1105 at para 17). The standard of review for credibility findings by the RPD is reasonableness (*Rahman v Canada (Citizenship and Immigration)*, 2019 FC 71 at para 18), as is that relating more generally to a panel's risk

assessment in the refugee context (*Martinez v Canada (Citizenship and Immigration)*, 2019 FC 1 at para 16).

VI. Analysis

A. *Did the Panel breach procedural fairness?*

[12] The Applicants, while acknowledging the *de novo* nature of the proceedings, argue that the Panel breached procedural fairness by failing to include the transcript of the first hearing in its record and refusing to consider it, and then relying on the first panel's factual findings.

[13] The Respondent counters that the Panel did not err, emphasizing that the redetermination was a *de novo* hearing, and the previous hearing transcript was unnecessary.

[14] I find that there was no breach of procedural fairness in this case.

[15] There is simply nothing in the Decision under review to indicate that the Panel relied on the previous panel's factual findings in making its negative credibility determination. In my reading of the Decision, the Panel was simply summarizing Counsel's argument as to why the transcript should have been included in the RPD's record, and what the previous panel had decided. The Panel approached this hearing as a *de novo* claim and nothing in the Court's record indicates anything to the contrary.

[16] However, since the Applicants impugned the fairness of the process, out of an abundance of caution, I invited the parties to provide post-hearing submissions on the propriety of exclusion of a transcript for a rehearing, when the RPD's usual practice is to include one.

[17] Counsel for the Applicants' post-hearing submission included section 5.1 of the Immigration and Refugee Board's *Policy on Court-Ordered Redeterminations*, which provides as follows:

> 5.1 File content where the Court has not found a denial of natural justice
>
> Where the Court has provided no specific directions and has made no determination that there was a denial of natural justice in the original hearing, the redetermination case file will contain:
>
> • jurisdictional documents (for example: notice of appeal, referral to the RPD, request for admissibility hearing or detention review); the Court order and any reasons;
>
> • the original decision(s) of the IRB and any reasons;
>
> • administrative documents (for example: notices to appear);
>
> • exhibits filed at the previous hearing(s);
>
> • any transcripts of the previous hearing (if available);
>
> • other evidence on the original file.
>
> (see: *Policy on Court-Ordered Redeterminations*, 5.1, online: https://irb-cisr.gc.ca/en/legal-policy/policies/Pages/PolOrderOrdon.aspx)

[18] The Applicants also rely on *Cheema v Canada (Citizenship and Immigration)*, 2014 FC 1082 at paragraph 25 where Justice Noël wrote "[i]t is settled law that it is acceptable for a new panel to use the transcripts from a refugee claimant's original hearing in a *de novo*

hearing before the RPD" which "can be used by a panel for purposes of fact-finding, such as to verify the veracity of a claimant's story".

[19] I agree with the Applicants that a transcript from the first hearing can certainly be used by a new panel. But that is not to say that it is required. The Court was clear on this in *Cheema*, and the position is certainly not a new one: Justice Rouleau of this Court had the following to say some two decades ago in *Kabengele v Canada (Minister of Citizenship and Immigration)*, [2000] FCJ No 1866:

> [45] […] The Court's position on the use of transcripts of the initial hearing at a re-hearing is already well settled. In *Diamanama v. M.C.I.*, IMM-1808-95, January 30, 1996 Reed J. stated:
>
> > With respect to the wording of the order, I do not think it appropriate to word it in a way which would limit the Board that rehears the application. . . . The second panel can, of course, use the transcript of the first hearing for whatever purposes it wishes but no order, from me, conditioning that use is either required or appropriate.
> >
> > [Citations omitted]

[20] While I acknowledge it would have been preferable to have had the transcript before the Panel at the second hearing, since the rehearing was expressly *de novo*, and since the Panel was not negatively influenced by the first panel's findings, I do not find that the transcript's absence was fatal to this Decision.

[21] In sum, given the fact that the Panel was not required to use the transcript from the first hearing, and that there is nothing to suggest that the Panel relied upon the previous panel's

factual findings in making its credibility determination, there was no breach of procedural fairness.

B. *Was the Panel's decision reasonable?*

[22] While the Applicants advance several arguments under the label of unreasonableness, they can be reduced to three – that the Panel failed to: (a) make reasonable credibility findings; (b) consider the reasons of the same Panel member in a previous decision, and of the RPD in brother-in-law Frantzy's positive refugee decision; and (c) determine that a family, as a social group, excludes a "family relation to a person targeted for a criminal motive".

[23] The Respondent counters all three assertions, maintaining that the Panel reasonably assessed the evidence and concluded its analysis on all three points.

[24] For the reasons that follow, I cannot accept the Respondent's position. Rather, I agree with the Applicants regarding the credibility findings which infect the Decision, rendering it unreasonable.

[25] First, with respect to credibility, I find that the Panel unreasonably rejected the Applicants' claim due to what it deemed to be inconsistencies between the Applicant and his wife's respective narratives and testimony, and their failure to explain those "inconsistences" relating to the identity of their agents of persecution and a connection between the incidents.

[26] The Panel took issue with the Applicant's narrative in which he stated that he did "not know who these men are that are targeting us", and his subsequent testimony where he said that it was the Chimères who were pursuing him. When confronted with this so-called inconsistency, the Applicant testified that he did not recognize the attackers, did not know them personally to identify them, but knew the group they were a part of. The Panel drew a negative credibility inference.

[27] As for the other issue regarding identity, namely the incident in which the Applicant's wife was mistaken for her sister-in-law Guerda and attacked, she testified that when the attackers beat her, they said that she was one of "the same bad people who have stores and businesses", and that they may have mistaken her for Frantzy's wife (Guerda) because Frantzy had opened a store.

[28] However, in the Applicant's wife's narrative, the Panel observed that she explained that while the attackers were insulting her, they made reference to her as the wife of the "building material merchant". Therefore, she wrote that even though they did not mention Frantzy's name, it was evident that the attackers mistook her for his wife, Guerda. The Panel found that this oral testimony was inconsistent with her narrative, and drew a negative credibility inference.

[29] I do not find these conclusions of inconsistency to be reasonable. The Applicants were consistent in both their written and oral testimony, stating that they did not recognize their attackers. Furthermore, they were consistent in their suspicion that their attackers were Chimères and that that they could not identify the men.

[30] Implausibility, inconsistency, omission and contradiction are all the cornerstones of adverse credibility findings that often lead to the rejection of refugee claims. However, such findings should not be based on a microscopic evaluation of issues peripheral or irrelevant to the case (*He v Canada (Citizenship and Immigration)*, 2019 FC 2 para 23). Such conclusions should be clearly justified. It is insufficient for a decision-maker to simply state a conclusion on credibility without properly explaining the reasons for it (*Gomez Florez v Canada (Citizenship and Immigration)*, 2016 FC 659 at para 23). Doing so will invariably render the conclusion to be unreasonable.

[31] Whether one describes the Panel's findings regarding the Applicants as microscopic or peripheral, or by some other label, the bottom line is that the Applicant's wife was physically attacked – which no one disputed. Whether she was attacked because she was the wife of the "building material merchant" who owned a store, or because her family consisted of the same "bad people who have stores and businesses", these are examples of slight variations upon the same theme, and thus irrelevant "contradictions". Rather, they are distinctions without a difference, and therefore constitute an unreasonable basis upon which to reject the claim.

[32] Regarding the other issues raised by the Applicant, I note that the Panel uses its flawed credibility findings to distinguish the Decision from its prior decision, as well as from Frantzy's case. Given this flawed foundation regarding credibility, there is no need to opine on the arguments regarding prior decisions, as the issue will have to be considered anew. For the same reason, I also decline to make any findings on the issue of the Applicants' family status as within a particular social group.

VII. Proposed question for certification

[33] The Applicants propose the following question for certification:

> Can a refugee claim succeed on the basis of a well founded fear of persecution for reason of membership in a particular social group that is a family, if the family member who is the principal target of the persecution is not subject to persecution for a Convention reason?

[34] The Respondent opposes certification.

[35] Given my findings above, I agree with the Respondent's view and will decline to certify the proposed question, because it is not dispositive of the appeal (*Lunyamila v Canada (Public Safety and Emergency Preparedness)*, 2018 FCA 22 at para 46).

VIII. Conclusion

[36] The reasonableness standard requires that a decision be intelligible, transparent, and justifiable, falling within the range of possible, acceptable outcomes. I do not find that this Decision falls within those parameters based on the Panel's credibility assessment, and the impact of that assessment on other parts of the Decision. The application for judicial review is accordingly allowed, with the matter to be reconsidered anew.

JUDGMENT in IMM-1540-18

THIS COURT'S JUDGMENT is that:

1. This application for judicial review is granted.
2. The decision is set aside, and the matter remitted for redetermination by a different panel.
3. No question will be certified.
4. There is no award as to costs.

"Alan S. Diner"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-1540-18
STYLE OF CAUSE:	GUSMAN CLERMONT, SHERLY CLERMONT BLANC, MARVENS CLERMONT, ANNELYSE CLERMONT V THE MINISTER OF CITIZENSHIP AND IMMIGRATION
PLACE OF HEARING:	TORONTO, ONTARIO
DATE OF HEARING:	JANUARY 8, 2019
JUDGMENT AND REASONS:	DINER J.
DATED:	JANUARY 25, 2019

APPEARANCES:

Raoul Boulakia	FOR THE APPLICANTS
Leanne Briscoe	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Raoul Boulakia Barrister and Solicitor Toronto, Ontario	FOR THE APPLICANTS
Attorney General of Canada Toronto, Ontario	FOR THE RESPONDENT