

Federal Court



Cour fédérale

Date: 20190301

Docket: IMM-2306-18

Citation: 2019 FC 249

Ottawa, Ontario, March 1, 2019

PRESENT: The Honourable Madam Justice Strickland

BETWEEN:

**RITA SEMYKINA
DMITRII SEMYKIN
SERGEY SEMYKIN**

Applicants

and

**THE MINISTER OF CITIZENSHIP
AND IMMIGRATION**

Respondent

JUDGMENT AND REASONS

[1] This is an application for judicial review of a decision by the Refugee Appeal Division [RAD] of the Immigration and Refugee Board of Canada, dated April 18, 2018, which dismissed the Applicants' appeal of the decision of the Refugee Protection Division [RPD], dated May 18, 2017, and confirmed the RPD's finding that the Applicants are neither Convention

refugees nor persons in need of protection within the meaning of s 96 and 97(1), respectively, of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA].

[2] I have determined that this application for judicial review must be granted. The RAD erred in its assessment, pursuant to Rule 29 of the *Refugee Appeal Division Rules*, SOR/2012-257 [RAD Rules], regarding the use of documents received by the RAD after the Applicants filed their appellants' record in the RAD proceeding.

Background

[3] The Applicants are a family of three, Rita Semykina [Female Applicant], her husband Dmitrii Semykin [Male Applicant], and their son Sergei Semykin [collectively, the Applicants], and are citizens of the Russian Federation. The Female Applicant is of Armenian ethnicity and the Male Applicant is Russian.

[4] The Applicants claim that the Female Applicant was a witness in a legal dispute between her employer and one of its clients, Mr. Yuri Molyarov, which dispute was decided by a Russian court in favour of her employer. After the hearing, Mr. Molyarov told the Female Applicant that they would meet again and used a racial insult.

[5] On December 27, 2015, the Female Applicant was returning home when she was attacked by a group of four people, one of whom was Mr. Molyarov, who beat her while yelling racial insults. The attackers fled when the Male Applicant intervened, but they threatened that they would finish her anyway. On the night of March 8, 2016, the Female Applicant and the

Male Applicant were outside a restaurant when they were attacked by what the Female Applicant described as “those same skinheads”. One of them had a knife and hit the Female Applicant with it. She lost consciousness and awoke in a hospital, where she remained for six days. While she was in the hospital, the Applicants filed a complaint with the local police who took the Female Applicant’s statement. The police later sent the Applicants a letter stating that they could not proceed “due to the lack of sufficient information for search and apprehension of possible perpetrators”.

[6] The Applicants then applied for Canadian temporary resident visas in the visitor class, which were issued on April 24, 2016. They sold their house to obtain enough money to pay for plane tickets to Canada, which they purchased on July 27, 2016. That same night, a group of people including Mr. Molyarov, broke into the Applicants’ home. The Applicants escaped and fled to Moscow where they remained until they flew to Canada on August 18, 2016.

[7] By a decision dated May 18, 2017, the RPD dismissed the Applicants’ joint claims for refugee protection. It found that the determinative issue was credibility. The RPD held that the Female Applicant gave vague and evasive testimony, that there were inconsistencies in her testimony, and that there were omissions from her Basis of Claim [BOC] narrative that were not satisfactorily explained. The RPD concluded, on a balance of probabilities, that the Female Applicant had not been persecuted due to her Armenian ethnicity and that her lack of credibility, with respect to her experiences in Russia, undermined the credibility of her allegations of a forward-looking risk of harm based on her ethnicity.

[8] The Applicants received the RPD's decision on May 30, 2017, filed a notice of appeal to the RAD on June 8, 2017, and perfected their appellants' record on June 26, 2017.

Decision Under Review

[9] Before the RAD, the Applicants submitted a number of arguments to support their view that the RPD erred in drawing adverse credibility findings based on perceived inconsistencies in the Female Applicant's testimony and omissions from the BOC.

[10] The Applicants submitted documents as new evidence before the RAD, with their appellants' record, under subsection 110(4) of the IRPA, namely various copies of social media correspondence in which Mr. Molyarov further threatened the Female Applicant, some undated, others dated June 8 and 9, 2017.

[11] Additionally, their appellants' record included a request by the Applicants for an extension of time to submit further evidence, which arose after the RPD dismissed their claims, and had been mailed to them, from Russia, on June 17, 2017. The request mentions that these documents would require translation following their arrival in Canada.

[12] The RAD record indicates that the Applicants sent these documents to the RAD on July 27 and 28, 2017, and that they were received by the RAD on July 28, 2017. The Applicants requested that the RAD admit the documents, subsequent to the perfection of their appellants' record, under RAD Rules 29 and 37. The documents that the Applicants filed on July 27 and 28, 2018, are as follows:

- i. An affidavit from the purchaser of the Applicants' house dated June 13, 2017, translated on June 25, 2017;
- ii. An affidavit from the Female Applicant's sister dated May 26, 2017, translated on July 14, 2017;
- iii. An affidavit from a friend of the Female Applicant dated June 15, 2017, translated on June 25, 2017;
- iv. A fire department incident report dated May 25, 2017, translated on July 25, 2017;
- v. A letter from a police inspector dated June 15, 2017, translated on July 25, 2017.

[collectively, the Documents]

[13] The Applicants also requested that the RAD hold an oral hearing because the new evidence was central to their refugee claim and, if accepted, would justify allowing their claims as provided by s 110(6) of the IRPA.

[14] The RAD refused to admit the undated messages filed with the appellants' record, holding that the Applicants failed to explain if they met the criteria of s 110(4) of the IRPA. The RAD also refused to admit the dated messages, though they did arise after the RPD Decision, finding that the messages lacked credibility. In the RAD's view, it was improbable that Mr. Molyarov would obtain the Female Applicant's email address and threaten her, with no apparent trigger, ten months after the Applicants departed from Russia.

[15] The RAD also refused to permit the Applicants to rely on the Documents, filed after perfection of their appellants' record. It found that the Applicants did not make reasonable

efforts to ensure that those documents arrived in time to be submitted with their appellants' record, such as taking steps other than "entrusting the documents to an apparently slow Russian postal service, such as arranging for the documents to be couriered".

[16] The RAD then refused to hold an oral hearing because it did not admit any new evidence.

[17] The RAD ultimately upheld the RPD's credibility findings and dismissed the Applicants' arguments and explanations on appeal. The RAD remarked that it listened to recordings of the hearings and agreed that the Female Applicant's testimony was vague and evasive. Moreover, the RAD dismissed the Applicants' argument that the RPD's questioning was deficient and that it failed to assess the evidence before it.

Determinative Issue

[18] When appearing before me, counsel for the Applicants and for the Respondent agreed and submitted that the issue of the RAD's refusal, pursuant to RAD Rule 29(4), to allow the Applicants to use the Documents was determinative. This is because the evidence speaks directly to the credibility of the Applicants' claim and forward-looking risk. Thus, if the RAD's refusal to permit the Applicants to use the Documents was unreasonable, the RAD's decision could not stand. I agree with the parties that this issue is determinative. I also agree with the Applicants that the RAD's refusal to permit the use of the Documents filed after the Applicants perfected their appellants' record is unreasonable.

[19] The RAD stated that the appellants' record was received by the RAD on June 26, 2017, and, some six weeks later, on August 11, 2017, the Applicants requested that the Documents be admitted in accordance with RAD Rule 29. The RAD acknowledged that in deciding whether to admit the documents it was required to consider the factors set out in RAD Rule 29(4). The RAD noted that in her August 11, 2017 affidavit, the Female Applicant explained that the Documents became available only after the RPD decision and that she could not have provided them with the appellants' record, as they were mailed by way of the Russian postal service. The RAD acknowledged that the Female Applicant had also asked for a postponement of her appeal to obtain an affidavit from her friend, but stated that this did not amount to a reservation of her right to enter documents after the appellants' record had been submitted without regard for RAD Rule 29(4).

[20] As to the Applicants' submissions explaining why the Documents should be admitted, the RAD stated that, based on their dates, the Documents were available between 11 and 20 days before the submission of the appellants' record. Moreover, given the Documents' professed importance, the RAD was not satisfied that the Applicants had made a reasonable effort to ensure that the Documents arrived in time to form part of the appellants' record. According to the RAD, a reasonable effort would have involved taking steps other than entrusting the documents to an apparently slow Russian Postal service, such as arranging for them to have been couriered. As such, the RAD refused to allow the Applicants to use the Documents.

[21] There are a number of problems with the RAD's reasoning. It is correct that the RAD received the appellants' record on June 26, 2017. In the written submissions contained within

that record, the Female Applicant requested that the appeal be postponed “to allot her time (with account of the travel of the mail)” to obtain the affidavit of her friend Ms. Marina Ostapenko concerning continued efforts by Mr. Molyarov to look for the Applicants, which was a new circumstance that occurred after the RPD hearings.

[22] In addition, in the appellants’ record, the Female Applicant included an unsworn affidavit requesting a 30-day extension to submit new evidence. In this affidavit, she stated that a person who received threats from Mr. Molyarov in Russia had made a sworn statement and sent it to her by mail on June 17, 2017. The parcel was still in transit and required certified translation upon arrival in Canada.

[23] Contrary to the RAD’s finding, the Documents were not submitted to the RAD on August 11, 2017. The Documents were sent by two letters dated July 27, 2017 and July 28, 2017, respectively, which were both stamped as received by the RAD on July 28, 2017. Thus, the RAD received the Documents approximately two weeks before the date attributed to their receipt by the RAD in its decision. Further, pursuant to RAD Rule 28, the documents had to be translated as the Female Applicant had indicated in her affidavit submitted to the RAD with the appellants’ record when seeking an extension of time to file additional documents. Even though the record includes the English translations, the latest of which were completed in Canada on July 25, 2017, the RAD does not seem to have taken this into consideration.

[24] Further, RAD Rule 29 states as follows:

29 (1) A person who is the subject of an appeal who does	29 (1) La personne en cause qui ne transmet pas un
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not provide a document or written submissions with the appellant's record, respondent's record or reply record must not use the document or provide the written submissions in the appeal unless allowed to do so by the Division.

(2) If a person who is the subject of an appeal wants to use a document or provide written submissions that were not previously provided, the person must make an application to the Division in accordance with rule 37.

(3) The person who is the subject of the appeal must include in an application to use a document that was not previously provided an explanation of how the document meets the requirements of subsection 110(4) of the Act and how that evidence relates to the person, unless the document is being presented in response to evidence presented by the Minister.

(4) In deciding whether to allow an application, the Division must consider any relevant factors, including

(a) the document's relevance and probative value;

(b) any new evidence the document brings to the appeal; and

(c) whether the person who is the subject of the appeal, with reasonable effort, could have

document ou des observations écrites avec le dossier de l'appelant, le dossier de l'intimé ou le dossier de réplique ne peut utiliser ce document ou transmettre ces observations écrites dans l'appel à moins d'une autorisation de la Section.

(2) Si la personne en cause veut utiliser un document ou transmettre des observations écrites qui n'ont pas été transmis au préalable, elle en fait la demande à la Section conformément à la règle 37.

(3) La personne en cause inclut dans la demande pour utiliser un document qui n'avait pas été transmis au préalable une explication des raisons pour lesquelles le document est conforme aux exigences du paragraphe 110(4) de la Loi et des raisons pour lesquelles cette preuve est liée à la personne, à moins que le document ne soit présenté en réponse à un élément de preuve présenté par le ministre.

(4) Pour décider si elle accueille ou non la demande, la Section prend en considération tout élément pertinent, notamment :

a) la pertinence et la valeur probante du document;

b) toute nouvelle preuve que le document apporte à l'appel;

c) la possibilité qu'aurait eue la personne en cause, en faisant des efforts raisonnables, de

provided the document or written submissions with the appellant's record, respondent's record or reply record.

transmettre le document ou les observations écrites avec le dossier de l'appelant, le dossier de l'intimé ou le dossier de réplique.

[25] Here, the Documents all post-date the RPD's decision which was rendered on May 18, 2017. Moreover, the Documents appear to concern three different incidents suggesting that the Female Applicant's persecutor, Mr. Molyarov, is still seeking to harm her. The three events described in the Documents all appear to have occurred after the RPD dismissed the Applicants' refugee claims. The Documents would appear to be relevant and probative, they bring new evidence to the appeal and they address credibility concerns raised by the RPD in addition to addressing the Applicants' forward looking risk. Moreover, the Documents also appear to be material to a proper assessment of the dated and undated social media correspondence filed with the appellants' record, which the RAD dismissed as lacking plausibility, notably because it found that "the timing of the [social media] threats is too fortuitous to be believable".

[26] However, the RAD did not assess these factors, which may support the use of the Documents. Instead, the RAD relied solely on RAD Rule 29(4)(c) to find that the Applicants had not made reasonable efforts to provide the Documents with the appellants' record because they relied on a Russian postal service, rather than a Russian courier. The RAD's failure to consider the other "relevant factors" provided under the RAD Rules, which the RAD "must consider", was unreasonable. Moreover, the RAD's finding that the Russian postal service was "apparently slow" seems to have been made based on its error as to the date that the Documents were

submitted to the RAD and its failure to consider that time was also required to translate the Documents once received.

[27] I would remark that, on their face, the RAD Rules and their interpretation by this Court afford refugee claimants some flexibility in filing additional documents that were not available at the time the appellant's record was perfected (see paragraph 159.91(2) of the *Immigration and Refugee Protection Regulations*, SOR/2002-227 and subsection 3(5) of the RAD Rules; *Aguirre Renteria v Canada (Citizenship and Immigration)*, 2016 FC 996 at 16-20; *Khakpour v Canada (Citizenship and Immigration)*, 2016 FC 25 at para 24). Where a claimant files evidence after perfection of their appellant's record following RAD Rule 29(4), proper consideration of the relevance, probative value, and prior availability of the evidence may support reasoned grounds for dismissing the evidence (*Denbel v Canada (Citizenship and Immigration)*, 2015 FC 629 at para 44). That said, when the RAD either fails to consider relevant factors in assessing evidence under RAD Rule 29(4), the reasons for refusing to admit that evidence arise from material factual errors, or those reasons lack in transparency such that they do not permit the reviewing Court to understand why the RAD refused to admit the evidence, this Court's intervention is warranted (*Agyemang v Canada (Citizenship and Immigration)*, 2016 FC 265 at paras 13-24).

[28] Here, the RAD made material factual errors in assessing the reasonable availability of the evidence filed after perfection of the appellants' record and did not perform any assessment of the other factors set forth in RAD Rule 29(4) despite their apparent relevance.

[29] In the result, the RAD's decision is unreasonable. The decision of the RAD must be set aside and the matter returned to another panel of the RAD for redetermination with respect to the new evidence filed both before and after perfection of the appellants' record in addition to the merits of the Applicants' claims for refugee protection.

[30] On a final note, the style of cause must be amended to properly designate the Minister of Citizenship and Immigration as the Respondent in this matter, as opposed to the Minister of Immigration, Refugees and Citizenship, as provided by subsection 4(1) of the IRPA (*Sakow v Canada (Citizenship and Immigration)*, 2019 FC 199 at para 36).

JUDGMENT in IMM-2306-18

THIS COURT'S JUDGMENT is that

1. The application for judicial review is granted. The decision of the RAD is set aside and the matter is returned to another panel of the RAD for redetermination in conformity with the above reasons for judgment;
2. There shall be no order as to costs;
3. No question of general importance for certification was proposed or arises;
4. The style of cause is amended to designate the "Minister of Citizenship and Immigration" as the Respondent.

"Cecily Y. Strickland"

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: IMM-2306-18

STYLE OF CAUSE: RITA SEMYKINA ET AL v MINISTER OF
CITIZENSHIP AND IMMIGRATION

PLACE OF HEARING: TORONTO, ONTARIO

DATE OF HEARING: FEBRUARY 21, 2019

JUDGMENT AND REASONS: STRICKLAND J.

DATED: MARCH 1, 2019

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