Federal Court Cour fédérale

Date: 20190920

Docket: IMM-1340-19

Citation: 2019 FC 1191

[UNREVISED CERTIFIED ENGLISH TRANSLATION]

Ottawa, Ontario, September 20, 2019

PRESENT: The Honourable Mr. Justice Pamel

BETWEEN:

NOELLA NTETA-TSHAMALA

Applicant

and

THE MINISTER OF CITIZENSHIP IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Overview

[1] This is an application for judicial review of a decision rendered by the Refugee Appeal Division [RAD] upholding a decision rendered by the Refugee Protection Division [RPD], which found that the applicant is neither a Convention refugee nor a person in need of protection within

the meaning of sections 96 and 97 of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA].

[2] The applicant maintains that the RAD erred in deciding not to admit a wanted notice, published in a newspaper article on July 1, 2015, and in disregarding, in the context of its credibility analysis, a psychiatric report demonstrating her psychological distress. The respondent maintains that it was reasonable for the RAD to refuse to admit the new evidence and conclude that the applicant lacked credibility.

[3] For the following reasons, there is no need to intervene in this case. The RAD rendered a reasonable decision in concluding that the applicant failed to demonstrate that the wanted notice published in the newspaper had not been reasonably available and in concluding that the psychiatric report did not address the credibility issues.

II. Facts

[4] The applicant, Noella Nteta Tshamala, is a citizen of the Democratic Republic of the Congo [DRC]. She worked as a housekeeper at a hospital centre in Maluku, DRC, from 2013 to 2015.

[5] In January 2015, the DRC was rocked by demonstrations against a bill intended to amend the electoral process. These demonstrations were the target of violent crackdowns and several individuals died or disappeared.

[6] During the night of March 14, 2015, the Head of the hospital instructed the applicant and her colleagues to clean the morgue. In the morgue, she and her colleagues discovered a lot of blood and human remains and they were required to clean the morgue discretely in exchange for US$300.

[7] On April 7, 2015, a mass grave containing 421 corpses was discovered in Maluku. On April 15, 2015, representatives of organizations concerned with human rights issues went to the hospital in order to question the applicant's colleagues who had been present during the night of March 14, 2015. The applicant subsequently quit her job and, a few days later, she learned that three of her colleagues who had been involved in cleaning the morgue had disappeared.

[8] During the night of April 24 to 25, 2015, the applicant's uncle and aunt were assassinated in their home. She fled to an aunt who lived in another area of the DRC and she subsequently travelled to Canada under a false identity on December 11, 2015. The gentleman who had accompanied her allegedly told her to claim refugee protection, which she did on February 4, 2016.

[9] The RPD rejected her claim for refugee protection for reasons related to credibility. In a decision dated January 25, 2019, the RAD upheld the decision rendered by the RPD. That decision is the subject of this application for judicial review.

III. Decision under review

[10] The RAD first addressed the new evidence presented by the applicant after the RPD had rendered its decision, i.e., (1) one page of a weekly newspaper containing a wanted notice, (2) an affidavit by the applicant and (3) an email attached to the affidavit, written by her brother-in-law (a lawyer in the DRC). The RAD refused to admit the newspaper containing the wanted notice because this element did not satisfy the criteria set out in subsection 110(4) of the IRPA and because the applicant had failed to provide a satisfactory explanation of the steps she had taken in her efforts to obtain it. The applicant's affidavit was rejected because it was argumentative, and the email from her brother-in-law was deemed to be inappropriate because it presented submissions and new arguments to justify certain gaps in the evidence provided by the applicant.

[11] Like the RPD, the RAD identified a number of issues concerning credibility. The RAD noted several contradictions and omissions in the applicant's testimony during the hearing before the RPD, despite the duration of the hearing (two days) and the special measures taken due to the applicant's vulnerable state. For example, the applicant's testimony concerning her colleagues who were allegedly killed lacked credibility. Furthermore, the RAD noted that the applicant had provided a more detailed description of the events during the hearing and had adjusted her testimony after being confronted with significant contradictions or omissions that she had made, which had an impact on her credibility. The RAD also noted several contradictions in the evidence that had not been highlighted by the RPD.

[12] The RAD accepted the applicant's argument that the psychological and medical reports should have been taken into consideration in the context of assessing her credibility. However, the applicant still bore the burden of demonstrating the facts that served as the basis for her

claim. The RAD agreed with the RPD's position that the psychological and medical reports could not prove the facts that served as the basis for the refugee protection claim. Moreover, the documents in the National Documentation Package concerning the mass grave discovered in Maluku were not sufficient to establish these facts. The RAD subsequently conducted an in-depth review of all the evidence presented by the applicant's brother-in-law, parents and aunt, noting several problematic aspects, and did not ascribe any value to these documents.

IV. Issues

[13] This matter raises three issues:

1) Did the RAD err in deeming the new evidence to be inadmissible pursuant to subsection 110(4) of the IRPA?

2) Did the RAD breach the principles of natural justice by failing to grant an additional hearing?

3) Did the RAD err in its assessment of the applicant's credibility?

V. Standard of review

[14] The first issue concerns the RAD's decision not to admit the new evidence pursuant to subsection 110(4) of the IRPA. In *Canada (Citizenship and Immigration) v Singh*, 2016 FCA 96 at para 29 [*Singh*], the Federal Court of Appeal affirmed that the applicable standard of review is reasonableness, in accordance with the presumption that an administrative body's interpretation of its home statute is owed deference by a reviewing court. With respect to the third issue, our Court has held that the standard of review of reasonableness applies to the RAD's findings concerning credibility (*Arafa v Canada (Citizenship and Immigration)*, 2019 FC 6 at para 28).

[15] For these two issues, the Court must therefore determine whether the findings are reasonable and whether they fall within a range of possible, acceptable outcomes which are defensible with respect to the facts and law (*Dunsmuir v New Brunswick*, [2008] 1 SCR 190 at para 47; *Canada (Citizenship and Immigration) v Khosa*, [2009] 1 SCR 339 at para 59 [*Khosa*]; *Newfoundland and Labrador Nurses' Union v Newfoundland and Labrador (Treasury Board)*, [2011] 3 SCR 708 at para 13).

[16] The second issue concerns natural justice and procedural fairness. It is established that the standard of review of correctness applies to issues concerning procedural fairness (*Khosa* at para 43).

VI. Analysis

1) Did the RAD err in deeming the new evidence to be inadmissible pursuant to subsection 110(4) of the IRPA?

[17] The applicant insists that the wanted notice is of fundamental importance to her refugee protection claim. The wanted notice supposedly demonstrates that the applicant is still being sought by the Congolese National Police.

[18] In its decision, the RAD concluded that this document could not be used because the applicant did not demonstrate that she had made adequate efforts to obtain the notice and because this document had been available during the hearing but was never filed, even though six months had elapsed between the conclusion of the hearing and the issuance of the decision by the RPD. In rendering this decision, the RAD considered the relevance and the probative value

of the document, any new evidence that the document brought to the appeal and whether the applicant, with reasonable effort, could have provided the document or written submissions as part of her file.

[19] The applicant maintains that the RAD simply disregarded her explanations concerning the fact that it had not been possible for her to obtain the notice. She claims to have explained the difficulties encountered in obtaining the notice, including delays in communications with the editor and a number of fairly typical problems associated with obtaining a document from a foreign country. The applicant maintains that these justifications are sufficient to satisfy the admissibility criteria set out in subsection 110(4) of the IRPA.

[20] The respondent, for its part, maintains that the RAD was right to refuse to admit the new evidence, based on the criteria set out in subsection 110(4) of the IRPA. The respondent also maintains that the applicant did not explain why she was not able to produce the article before the RPD rendered its decision.

[21] On this point, I must conclude that the RAD's conclusion was reasonable.

[22] Subsection 110(4) of the IRPA sets out the criteria for admissibility of evidence that was not presented before the RPD. This subsection authorizes the RAD to accept new evidence "that arose after the rejection of their claim", that "was not reasonably available", or that the person "could not reasonably have been expected in the circumstances to have presented, at the time of the rejection". In *Singh*, at paragraphs 34 and 35, the Federal Court of Appeal noted that the three

conditions mentioned in subsection 110(4) must be met, because they were “inescapable and would leave no room for discretion on the part of the RAD”.

[23] I must note that the limited power to admit new evidence must be interpreted in light of the very purpose of the RAD. As pointed out by the Federal Court of Appeal, the RAD is not a tribunal which “starts anew: the record below is not before the appeal body and the original decision is ignored in all respects” (*Canada (Citizenship and Immigration) v Huruglica*, 2016 FCA 93 at para 79 [*Huruglica*]). The RAD intervenes only when the RPD “is wrong in law, in fact or in fact and law” (*Huruglica* at para 78; *Majebi v Canada (Citizenship and Immigration)*, 2016 FCA 274 at para 8 [*Majebi*]).

[24] In *Singh*, at paragraphs 40 to 44, the Federal Court of Appeal also concluded that the criteria recognized in *Raza v Canada (Minister of Citizenship and Immigration)*, 2007 FCA 385 [*Raza*], also apply to subsection 110(4), given the similarities between subsection 110(4) and paragraph 113(a). These criteria are credibility, relevance, newness and materiality (*Raza* at para 13; *Singh* at para 38). However, the Federal Court of Appeal acknowledged that a number of criteria (i.e., newness and materiality) were less relevant in the application of subsection 110(4) (*Singh* at paras 46–48).

[25] With respect to the order in which the analysis is to be conducted, the criteria in *Raza* (the so-called “implicit” criteria in subsection 110(4)) only apply in an analysis of the admissibility of new evidence when the requirements (the so-called “explicit” criteria) in subsection 110(4) of the IRPA have been met (*Fida v Canada (Minister of Citizenship and Immigration)*, 2015 FC

784 at paras 6–8; *Deri v Canada (Minister of Citizenship and Immigration)*, 2015 FC 1042 at paras 55–56; *Boban v Minister of Citizenship and Immigration*, 2017 FC 919 at paras 14–15; *Majebi* at para 19). The possibility that new evidence may contradict a finding by the RPD is not sufficient to bring the evidence within the parameters of subsection 110(4) of the IRPA (*Arafa v Canada (Citizenship and Immigration)*, 2019 FC 6 at para 43 [*Arafa*]).

[26] With respect to the second condition set out in subsection 110(4), the applicant claims that the wanted notice was not reasonably accessible. In assessing the possibility of admitting evidence under this condition, the Federal Court focuses primarily on the reason why the evidence concerned could not have been presented before the RPD before the latter rendered its decision (*Hassan v Canada (Immigration, Refugees and Citizenship)*, 2019 FC 459 at paras 23–24; *Arafa* at paras 40–41). An inadequate explanation or the absence of an explanation to justify the delay allows the decision-maker to refuse to admit the evidence (*Abdi v Canada (Citizenship and Immigration)*, 2019 FC 54 at paras 25–26; *Akanniolu v Canada (Citizenship and Immigration)*, 2019 FC 311 at paras 42–44).

[27] In this case, the RAD had several doubts concerning the applicant’s efforts to obtain the wanted notice. In the reasons for its decision, the RAD noted that the applicant did not provide any information on her efforts in this regard and failed to provide several details concerning the emergence of this document, i.e., the date on which her brother-in-law became aware of the notice, the name of the person who informed her brother-in-law of the notice and the date on which her brother-in-law contacted the editor. The RAD summarized these doubts after

presenting a detailed chronology of the efforts made to obtain the notice. The RAD also noted that the applicant had filed the notice two months after it was received by her brother-in-law.

[28] Further to a reading of the file, it is reasonable to conclude that the applicant did not provide a sufficient explanation that would justify having the notice admitted into the record. Given her silence on the steps taken to obtain the notice, it is reasonable to conclude that she did not make sufficient efforts to obtain the notice, which, I must point out, was published in a newspaper almost two years before the decision rendered by the RPD. Essentially, the applicant relied on her brother-in-law to take the necessary steps to obtain the notice, when, at the very latest, she was aware of its existence at the time of the second hearing held by the RPD. The case at bar does not involve a third party that refused to hand over evidence in bad faith in a situation that was beyond the applicant's control (*Denis v Canada (Citizenship and Immigration)*, 2018 FC 1182 at paras 59–61).

[29] I asked counsel for the applicant to send me the original of the weekly newspaper containing the wanted notice, which he did. It seems to me, even if I assume that the document is authentic, that it would have been publically accessible and could have been obtained relatively easily.

2) Did the RAD breach the principles of natural justice by failing to grant an additional hearing?

[30] The applicant alleges that the RAD should have granted her a new hearing in order to assess the wanted notice. Since this evidence is inadmissible, the RAD was not required to exercise its discretionary power to grant a new hearing (subsection 110(6) of the IRPA; *Kreishan*

v Canada (Citizenship and Immigration), 2019 FCA 223 at para 43), in the absence of a new and serious issue.

3) Did the RAD err in its assessment of the applicant's credibility?

[31] The applicant maintains that the RAD should have been more sensitive to her vulnerability. According to the applicant, the RAD simply disregarded relevant findings in the psychiatric assessment report and instead used it to find flaws in the applicant's testimony.

[32] The respondent, for its part, maintains that the RAD did in fact consider the psychological report, as well as letters from a social worker and the applicant's doctor. The respondent argued that the fact that the aforementioned evidence was taken into consideration demonstrates the reasonableness of the RAD's findings.

[33] On this point, the analysis conducted by the RAD was reasonable. In its decision, the RAD noted that the psychiatric report and the letters demonstrate that the applicant suffers from psychological distress. The RAD did not dispute this diagnosis and even took it into consideration in its analysis of the applicant's testimony. However, the RAD found that this diagnosis cannot prove the facts that led to the diagnosis or the facts underlying the refugee protection claim. I do not find anything unreasonable about this assessment of gaps in the evidence. Since psychological assessments are often based on hearsay, it is reasonable to conclude that a report does not prove the facts underlying the claim (*Kabedi v Canada (Minister of Citizenship and Immigration)*, 2005 FC 154 at paras 19–20).

[34] In the decision rendered in *Uwimana v Minister of Citizenship and Immigration*, 2012 FC 794, the Court states the following at paragraph 32:

> That being said, the guideline cannot help make credible a testimony that is deficient due to implausibilities or contradictions that cannot be directly linked to the claimant's state of vulnerability.

[35] In her submissions, the applicant stresses the fact that the psychiatric report could address the deficiencies in her credibility. I do not accept this argument. The RAD may ascribe little probative value to a psychological assessment when it has doubts regarding the existence of the facts underlying the claim for refugee protection or the applicant's credibility (*Brahim v Canada (Citizenship and Immigration)*, 2015 FC 1215 at para 17; *Kaur v Canada (Citizenship and Immigration)*, 2012 FC 1379 at paras 36–37). Unless the psychological report strongly suggests that the RAD acted in an unreasonable manner, the Court should not intervene (*Kaur* at para 38). After a reading of the report and the letters, I find that the psychiatric report does nothing of the sort.

VII. Conclusion

[36] For these reasons, the decision rendered by the RAD was reasonable. The application for judicial review is dismissed. The parties did not propose a question for certification.

JUDGMENT in Docket IMM-1340-19

THIS COURT ORDERS AND ADJUDGES that:

1. The application for judicial review is dismissed;

2. No question is certified.

"Peter G. Pamel"
Judge

Certified true translation
This 15th day of October, 2019.

Francie Gow, BCL, LLB

FEDERAL COURT

SOLICITORS OF RECORD

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