Federal Court  Cour fédérale

Date: 20191220

Docket: IMM-3740-19

Citation: 2019 FC 1654

Vancouver, British Columbia, December 20, 2019

PRESENT: The Honourable Mr. Justice Lafrenière

BETWEEN:

PAJARILLO, DONNA PARCASIO

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

[1] The Applicant, Donna Parcasio Pajarillo, seeks judicial review of a decision of the Refugee Appeal Division [RAD], confirming the decision of the Refugee Protection Division [RPD] that she is neither a Convention refugee nor a person in need of protection pursuant to paragraph 111(1)(a) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA] after finding that the Applicant had a viable internal flight alternative [IFA] in the Philippines in either Cebu City or Davao [the Decision].

[2] For the following reasons, I am not satisfied that the RAD committed any error in reaching its findings. The Decision is transparent, intelligible, and well supported by the relevant facts and law. The application is accordingly dismissed.

I. Background

[3] The background facts may be stated briefly as follows. The Applicant is a citizen of the Philippines who came to Canada in 2007 on a work permit. Her last work permit expired in 2009 and she has been living in Canada without legal status since that time. She has one child, born on August 3, 2015 in Canada.

[4] In March 2017, the Applicant made a refugee claim on the basis that she would be at risk of harm from her uncle if returned to the Philippines. The Applicant claimed that between March 2001 and March 2002, when she was around 19 years old and living with the uncle and his family, he sexually abused her.

[5] On April 12, 2018, the RPD heard the Applicant's refugee claim. At the end of the hearing, after taking a break, the RPD rendered an oral decision. The RPD found the Applicant to be a credible witness and accepted that the uncle sexually abused the Applicant when she was residing in his home. The RPD did not doubt that the Applicant had a subjective fear of her uncle, despite the substantial delay in making her claim. Moreover, the RPD found that the Applicant's fear of persecution had a nexus to a Convention ground based on her gender as a woman. The RPD nonetheless dismissed the Applicant's claim on the basis that the determinative issue was the presence of a viable IFA in either Davao or Cebu City. The RPD

held that the Applicant had not shown that she would be at risk from the uncle, or that it would be unreasonable for her to seek refuge, in the proposed IFAs.

II. RAD Appeal and Decision

[6] The Applicant appealed the RPD decision to the RAD. In support of her appeal, the Applicant submitted an affidavit as well as thirteen documents said to be new evidence.

[7] The Applicant raised two issues on appeal to the RAD. First, she alleged that the RPD incorrectly applied the legal test for an IFA and failed to properly consider her particular circumstances. Second, she alleged that the RPD was biased against her and did not approach her case with an open mind.

[8] On May 27, 2019, the RAD issued its reasons and decision dismissing the Applicant's appeal. The RAD found that the affidavit and new documents submitted on appeal were inadmissible pursuant to subsection 110(4) of the IRPA.

[9] It further found that the RPD did not err by finding the Applicant had a viable IFA. The RAD determined that there was insufficient credible evidence to establish that the uncle was interested in locating and harming the Applicant in one of the proposed IFAs and that it was not unreasonable, given the Applicant's personal circumstances, for her to relocate there. The RAD noted that the proposed IFAs were major urban areas with large populations and a substantial distance from the uncle's residence in Quezon City, Manila.

[10] Finally, the RAD rejected the Applicant's argument that that the RPD member was biased against the Applicant due to a partially or fully pre-typed decision that was rendered orally at the end of the hearing. The RAD noted that the RPD's decision provided multiple references to the Applicant's testimony given at the hearing. The RAD also observed that pursuant to Rule 10(8) of the *Refugee Protection Division Rules*, SOR/2012-256 [RPD Rules], RPD members are expected to render oral decisions and reasons at the end of the hearing "unless it is not practicable to do so". The RAD concluded that the RPD did not predetermine the Applicant's case and that there had been no breach of natural justice.

III. Grounds for Review

[11] The Applicant seeks judicial review of the RAD's decision. She argues that the RAD erred in finding that: (1) the Applicant had a viable IFA; (2) the new evidence submitted on appeal to the RAD was inadmissible; and (3) there was no apprehension of bias on the part of the RPD member. She also argues that she was unable to provide evidence of the unviability of the IFAs to the RPD because she was not given sufficient notice of the proposed IFAs.

[12] This last argument will not be entertained for the following reasons. First, the Applicant did not raise any issue before the RPD that she could not address the IFA matter nor did she ask for an adjournment. Second, the argument was not raised before the RAD. The RAD therefore cannot be faulted for not deciding an issue that had not been argued and that did not emerge perceptibly from the evidence presented as a whole. In any event, as conceded by Applicant's counsel before me, the Applicant was provided notice that the RPD specifically identified Cebu

City and Davao as viable IFAs at the beginning of the hearing and submissions were made regarding these IFAs during the hearing.

IV. Analysis

[13] The parties agree that the standard to be applied in reviewing the RAD's decision relating to admissibility of new evidence and its factual findings relating to the risk of harm and the viability of an IFA is reasonableness. They also agree that the issue of bias raises a question of fairness and is reviewable on the standard of correctness. I have reviewed the recent decisions of the Supreme Court of Canada in *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 [*Vavilov*] and *Bell Canada v Canada (Attorney General)*, 2019 SCC 66, and more particularly par. 144 in *Vavilov*, and see no reason on the facts of this case to request additional submissions from the parties on either the appropriate standard or the application of that standard.

[14] A preliminary issue to be determined is whether the Applicant's affidavit filed in support of the present application is admissible. The Respondent submits that the affidavit should be not considered as it essentially consists of arguments and subjective opinions. I agree. As a general rule, the evidentiary record before this Court on judicial review is restricted to the evidentiary record that was before the RAD. The Applicant has failed to establish that the evidence falls within any recognized exception.

A. *Did the RAD err by refusing to accept any of the documentary evidence and the Applicant's sworn affidavit?*

[15] The Applicant sought to introduce Google search results for flights from Manila to Cebu City and Davao, government travel advisories for the Philippines, numerous newspaper articles, and typing speed information from the internet as new evidence on her appeal. She also sought to rely on her own affidavit. The RAD determined that this new evidence was inadmissible. For the following reasons, I see no error in this finding.

[16] Subsection 110(4) of the IRPA allows an appellant to present evidence that arose after the rejection of their claim or that was not reasonably available, or evidence that the person could not reasonably have been expected in the circumstances to have presented at the time of the rejection of her refugee claim. If the new evidence meets the requirements of ss. 110(4), the RAD must then apply the analysis set out by the Federal Court of Appeal in *Raza v Canada (Citizenship and Immigration)*, 2007 FCA 385 [*Raza*] and *Canada (Citizenship and Immigration) v Singh*, 2016 FCA 96 [*Singh*].

[17] The Applicant submits that a more flexible approach to the new evidence was warranted in this case. She also argues that the RAD never conducted a meaningful analysis in accordance with *Raza* and *Singh*. I disagree.

[18] The burden of establishing the admissibility of new evidence lies on the appellant, necessitating full and detailed submissions on its admissibility and relevance. Aside from the statement to the RAD that the evidence either "arose after the refugee hearing or it was not reasonably available earlier", the Applicant did not provide any further or more detailed

submissions on the admissibility and relevance of the new evidence. Once again, the RAD cannot be faulted for failing to decide an issue that was not properly argued.

[19] Given the paltry arguments made to the RAD, the date of the documents (or the lack thereof) and their generic nature, it was open to the RAD to conclude that most of the new evidence was reasonably available to the Applicant at the time of her RPD hearing. With respect to the few media articles that were dated after the rejection of the claim, the RAD member assessed their newness, credibility, and relevance and reasonably determined that they did not add something new or prove a fact that was unknown at the time of the RPD hearing.

[20] As for the Applicant's affidavit, the RAD's finding that it did not contain any new evidence is unimpeachable. The affidavit primarily consists of an outline of the reasons the Applicant disagrees with the findings, analysis, and decision of the RPD. The RAD reasonably found that such statements constitute argument. The Applicant has failed to establish any error in the RAD's finding that the portions of the affidavit that were evidentiary either did not arise after the rejection of the claim or were reasonably available at the time of the RPD hearing.

[21] Finally, I reject the Applicant's assertion that RAD should have adopted a more flexible approach to the new evidence. The admissibility of new evidence before the RAD is governed by ss. 110(4) and the RAD has no discretion to deviate from the strict criteria.

B. *Did the RAD err in its determination that a viable IFA is available to the Applicant?*

[22] The Applicant argues the RAD failed to apply both parts of the IFA test appropriately, reaching a conclusion that is unreasonable.

[23] Regarding the first part of the test, the Applicant argues the RAD adopted the flawed analysis of the RPD. She submits that it was speculative of the RAD to conclude her uncle will not be obsessed or interested in abusing her again in the proposed IFAs, and she maintains that she would be exploited and abused if she returns to the Philippines.

[24] The Applicant also asserts that it is illogical to conclude that the geographical distance between the proposed IFAs and her uncle's residence would not allow her uncle to find her, given that there are dozens of flights per day and anyone can travel with ease between the cities.

[25] The Applicant, in essence, wants the Court to reweigh the evidence before the RAD and reach a different conclusion—something that this Court should not do. She also relies on evidence which was found by the RAD to be inadmissible in support of her arguments on judicial review.

[26] The record reasonably supports the RAD's finding that the evidence did not establish that the Applicant's uncle was obsessed with her as alleged or that the uncle or any of his associates have the desire or motivation to seek out the Applicant and cause her harm if she relocated to the proposed IFAs. The RAD noted that the Applicant has been living outside of the Philippines since 2002, and has had no contact with her uncle except for a few phone calls in 2016 urging her to return to the Philippines. It also noted that there are significant differences between the

Applicant's situation at the time she was abused by the uncle and her present circumstances, including that she is now an adult and no longer financially dependent on him.

[27] Moreover, I see no error in the RAD's finding that there was insufficient evidence that the uncle or his associates would be able to locate the Applicant in the proposed IFAs—two major urban centers that have large populations and are far away from where the uncle resides.

[28] Regarding the second part of the test, the Applicant argues the RAD failed to consider the forced separation of the Applicant from her young daughter. The Applicant testified during the hearing before the RPD that she believes that her former boyfriend and father of her daughter will not allow her to take her daughter with her to the Philippines.

[29] The Respondent submits that it is was speculative on the part of the Applicant to suggest she will not be able to take her daughter with her to the Philippines as she had not provided any evidence to support this scenario. While that may be, the RPD makes no mention of the Applicant's evidence in its decision. It simply assumes for the purpose of the IFA analysis that the Applicant's daughter will be living with her in the Philippines.

[30] The failure by the RPD to consider the possibility of forced separation was squarely raised by the Applicant in her Appellant's Memorandum. However, the RAD does not address issue in the Decision. This was an error on its part.

[31] This Court has held that an applicant's family situation is a human factor that ought not to be excluded in applying the second branch of the internal flight alternative test: *Ramanathan v Canada (Minister of Citizenship and Immigration)*, 1998 CanLII 8469 (FC), [1998] FCJ No 1210; *Sooriyakumaran v Canada (Minister of Citizenship and Immigration)*, 1998 CanLII 8566 (FC), 156 FTR 285.

[32] It remains that the absence of relatives in a safe place is only an objectively reasonable basis to reject the IFA if the absence itself would jeopardize life and safety. In *Ranganathan v Canada (Minister of Citizenship and Immigration)*, 2000 CanLII 16789 (FCA), [2001] 2 FC 164, the Federal Court of Appeal cautioned against blurring the distinction between refugee claims and humanitarian and compassionate applications. The Court confirmed that there is a high threshold for the unreasonableness test at paragraph 15:

> […] It requires nothing less than the existence of conditions which would jeopardize the life and safety of a claimant in travelling or temporarily relocating to a safe area. In addition, it requires actual and concrete evidence of such conditions. The absence of relatives in a safe place, whether taken alone or in conjunction with other factors, can only amount to such condition if it meets that threshold, that is to say if it establishes that, as a result, a claimant's life or safety would be jeopardized. This is in sharp contrast with undue hardship resulting from loss of employment, loss of status, reduction in quality of life, loss of aspirations, loss of beloved ones and frustration of one's wishes and expectations.

[33] While I agree with the Applicant that the RAD erred in not considering, for the purpose of the unreasonableness inquiry, the fact that the Applicant may be forced to leave her daughter behind, it is a factor which carries little weight unless it meets the threshold mentioned above.

[34] The Applicant adduced no evidence establishing that her life or safety would be jeopardized if she was required to relocate either alone or with her child. Therefore, the RAD's error was immaterial. I am satisfied after having reviewed the transcript and the Applicant's scant evidence regarding custody arrangements that the RAD would have come to the same conclusion had it considered that evidence.

[35] The Applicant also argues the RAD did not reasonably consider her particular circumstances. She asserts that the RAD should have considered her ability (as a woman) to travel safely to the IFAs and stay there without facing undue hardship, and the RAD should also have accounted for the ways religious, economic and cultural factors affect women in the IFAs. The Applicant further submits that the RAD did not address her security, physical and financial barriers, the permanent separation of her family, her employment, her ability to raise a family or her unfamiliarity with the proposed IFAs. I disagree.

[36] Other than the issue of forced separation, which the RAD appears not to have analyzed, the RAD carefully considered the personal circumstances of the Applicant, including her gender and her status as a single parent if she returned to the Philippines, in assessing the reasonableness of the proposed IFAs. The RAD referred to the *Guideline - Women Refugee Claimants Fearing Gender-Related Persecution* and considered the Applicant's circumstances, including her level of education, work experience, gender and status as a single parent. The Applicant did not demonstrate she would be unable to secure shelter or employment in the proposed IFAs or that she would be unable to support herself or her daughter. The RAD recognized that single, unwed mothers face discrimination in the Philippines but found that this did not amount to persecution.

The Applicant may disagree with the RAD's conclusion, however she has not identified any reviewable error.

C. *Was the RPD biased against the Applicant?*

[37] The Applicant submits that the RPD was biased against her because the member made up her mind to reject the Applicant's claim prior to hearing. The sole basis for making this serious allegation against the member is that she returned after a lunch break and proceeded to render a lengthy oral decision. This argument is wholly without merit.

[38] The threshold for establishing bias is high, as it is a serious allegation. It is assumed the RPD and RAD act impartially and independently. The allegation of bias cannot rest on mere suspicion, insinuations or even the impressions of a party or its counsel.

[39] The mere fact that the RPD was able to draft a decision and render it orally shortly 50 minutes after the conclusion of the hearing does not prove bias. A review of the transcript of the hearing discloses that the RPD member took into account the Applicant's testimony and counsel's arguments in reaching her decision.

[40] Moreover, the RAD correctly noted that RPD members are expected to render oral decisions and reasons at the end of hearings unless it is not practicable to do so. The Applicant has failed to establish that the facts or issues in the Applicant's case were so substantial or complex it was not reasonably practicable to comply with Rule 10(8) of the RPD Rules.

V. Conclusion

[41] For the above reasons, the application for judicial review is dismissed.

[42] There are no questions for certification.

JUDGMENT IN IMM-3740-19

THIS COURT'S JUDGMENT is that the application for judicial review is dismissed.

"Roger R. Lafrenière"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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