

Federal Court



Cour fédérale

Date: 20200207

Docket: IMM-6518-18

Citation: 2020 FC 216

Ottawa, Ontario, February 7, 2020

PRESENT: Mr. Justice Pentney

BETWEEN:

BETTY KALULE NAGGAYI

Applicant

and

**THE MINISTER OF CITIZENSHIP AND
IMMIGRATION**

Respondent

JUDGMENT AND REASONS

[1] The Applicant, Betty Kalule Naggayi is a citizen of Uganda who seeks to overturn the decision of the Refugee Appeal Division (RAD), which dismissed her claim for asylum on December 6, 2018.

I. Context

[2] The essence of the Applicant's claim for refugee status is that she was a victim of domestic violence on the part of her husband and one of his other wives, after being forced to

enter an arranged marriage. The Refugee Protection Division (RPD) rejected her claim on the basis that it did not believe that she had been married. The RAD upheld this finding, after conducting its own analysis of the evidence in the record. It also concluded that the Applicant's claims were not credible.

[3] The RAD rejected the new evidence the Applicant attempted to file on appeal, on the basis that it did not meet the tests set out in subsection 110(4) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA], as interpreted by the Federal Court of Appeal in *Canada (Citizenship and Immigration) v Singh*, 2016 FCA 96 [Singh]. It also rejected the request for an oral hearing, since the new evidence had not been accepted. The RAD then analyzed the evidence that had been before the RPD and found that the Applicant had not established that she was a member of a particular social group, namely women who were vulnerable to being forced into arranged marriages. Furthermore, it found that the Applicant's lack of knowledge of her husband, and the absence of any independent evidence to corroborate the marriage, undermined her credibility. The RAD therefore confirmed the RPD's determination that she was neither a refugee nor a person in need of protection under sections 96 or 97 of IRPA.

II. Issues and Standard of Review

[4] The Applicant seeks judicial review of this decision, pursuant to section 72 of IRPA. She claims that the RAD erred by: (i) rejecting the new evidence that she attempted to file on appeal, and then denying her request for an oral hearing; (ii) denying her procedural fairness, by raising a new issue without giving her notice of it or a chance to respond; and (iii) conducting an unreasonable assessment of the evidence.

[5] The standard of review in regard to procedural fairness most closely aligns with the “correctness” standard, but in reality what a reviewing court must do is to determine whether the process was fair, having regard to all of the circumstances: *Canadian Pacific Railway Company v Canada (Attorney General)*, 2018 FCA 69, at para 54.

[6] The standard of review in regard to the new evidence issue and the assessment of the evidence is reasonableness: *Andrade v Canada (Citizenship and Immigration)*, 2018 FC 505 at para 9; *Sisay Teka v Canada (Citizenship and Immigration)*, 2018 FC 314 at para 17. When this case was argued, the leading authorities on reasonableness review were *Dunsmuir v New Brunswick*, 2008 SCC 9 and its progeny. I have reviewed the recent decisions of the Supreme Court of Canada in *Canada (Citizenship and Immigration) v Vavilov*, 2019 SCC 65 [*Vavilov*]; *Bell Canada v Canada (Attorney General)*, 2019 SCC 66, and *Canada Post Corp v Canadian Union of Postal Workers*, 2019 SCC 67 [*Canada Post*]. In view of paragraph 144 of *Vavilov*, I 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. As stated in *Canada Post* at paragraph 26, under both frameworks the result in this case would be the same.

III. Analysis

A. *Did the RAD err in rejecting the new evidence filed on appeal?*

[7] The core of the Applicant’s refugee claim was that she had been forced to enter into an arranged marriage and had experienced gender-based violence from her husband and one of his other wives. The RPD rejected her claim because it found she was not credible regarding her marriage. In order to overcome this finding on appeal, the Applicant presented new evidence: an

official letter from the Kingdom of Buganda confirming that she was married, and an e-mail from the friend in Uganda who had helped her flee the country, which explained how the official letter had been obtained.

[8] The RAD found that this evidence did not meet the test set out in subsection 110(4) of *IRPA*, as set out in the *Singh* decision. In particular, the official letter did not speak to events that had occurred subsequently to the RPD decision, and was thus rejected as an attempt to complete a deficient record. The RAD rejected the e-mail from the friend because it did not speak to relevant facts regarding the refugee claim.

[9] The Applicant submits that the RAD erred because she had filed a copy of her traditional marriage certificate before the RPD and had no reason to believe that it would be questioned. It was only when she read the RPD's decision that she realized it had concerns about the validity of the certificate, and so she then obtained further evidence to substantiate her claim.

[10] I am not persuaded that the RAD erred in its application of the rules regarding new evidence on appeal. The Federal Court of Appeal in *Singh* confirmed that the provisions of subsection 110(4) are “inescapable and ... leave no room for discretion on the part of the RAD” (at para 35). Parliament decided that RAD appeals were to proceed on the basis of the record before the RPD, except in certain limited circumstances. Accordingly, new evidence is only admissible before the RAD if it arose after the rejection of the claim, was not reasonably available, or if it was available, that the claimant could not reasonably have expected in the circumstances to have presented it at the RPD hearing (*Singh*, at para 34).

[11] The RAD applied this test to the new evidence submitted by the Applicant, and explained its reasoning clearly. The crux of the Applicant's refugee claim was that she had fled an abusive forced marriage. The RPD did not find her credible regarding the marriage. In order to overcome this, she attempted to file the official letter confirming her marriage. The RAD found that this letter did not pertain to events that were subsequent to the dismissal of the refugee claim, and so it rejected it. The RAD's conclusion on this point is well supported by both the law and the facts.

[12] I agree with the Applicant that the RAD's explanation for why it did not accept the e-mail from her friend is faulty, but this is not a basis to find the decision to be unreasonable. The e-mail simply explained how the official letter had been obtained, and once the RAD rejected the official letter, the e-mail from the friend did not provide new evidence about the substance of her claim.

[13] For these reasons, I do not find the RAD's rejection of the new evidence to be unreasonable. I also find the RAD's refusal to hold an oral hearing to be reasonable, in light of the provisions of subsection 110(6) of *IRPA* as there was no new admissible evidence.

B. *Did the RAD deny procedural fairness by raising a new issue without notice to the Applicant?*

[14] The Applicant submits that the RAD's finding that she had not established that she was a member of a particular social group denied her procedural fairness because it was a new issue that the RAD raised without giving her notice and an opportunity to reply.

[15] This argument rests on the RAD's analysis of the merits of her appeal. The RAD applied *Chairperson's Guideline 4: Women Refugee Claimants Fearing Gender-related Persecution* and reviewed the documentary evidence about forced marriages in Uganda, noting that there are no cultural traditions prescribing such marriages in any ethnic group. Rather, the evidence showed that arranged marriages are especially prevalent in rural areas, as a means for parents to gain wealth in the form of a dowry. On the basis of this, the RAD stated at paragraph 18 of its decision:

The [Applicant] was born in her country's capital; at the time of the alleged forced marriage, she was already 25 years old and had completed university studies in India, and her aunt was a businesswoman who owned her own shop in Kampala. In my opinion, she has not established that she is a member of a particular social group that, in Uganda, is made up of minor women who are uneducated, live in rural areas, are generally victims of forced marriages and lack the capacity to refuse such a marriage.

[16] The Applicant submits that this amounts to a new issue, because her claim was not based on a claim that she was part of the particular social group of women who are vulnerable to forced marriages, and the RPD did not make any findings about that. Thus, the RAD raised a new issue, and its failure to advise her of that and to provide an opportunity to address it amount to a denial of procedural fairness.

[17] The Respondent argues that this finding simply related to the overall assessment of the validity of the traditional marriage. The Applicant was aware that this was a core issue for the RPD and it lay at the heart of her appeal to the RAD. The Respondent submits that there was no denial of procedural fairness because the Applicant has been aware from the outset that she had

to establish that she was married, and the RAD's consideration of the wider social and cultural context in Uganda was not a new issue.

[18] I agree with the Respondent. This was not an entirely new issue, and the RAD did not deny the Applicant procedural fairness by considering her claim in the context of the documentary evidence about Uganda. This becomes clear when one examines the RPD decision, in which the member considered the evidence about the arranged marriage, and noted: "The [Applicant] is not illiterate or from a faraway village. She is a university educated young lady from the capital city of Kampala. Her ignorance regarding basic information related to her alleged husband leads me to conclude that she never married him and that this allegation is false" (at para 11).

[19] Although not couched in the terminology of "particular social group," the RPD made the finding in the context of its assessment of the Applicant's credibility. The RAD conducted its own analysis, and considered the Applicant's claim, in part, against the backdrop of the documentary evidence regarding the practice of forced marriage in Uganda. This did not take the Applicant by surprise, and it is not an entirely new issue, since the basis of her appeal was that the RPD had erred in its assessment of her credibility, in particular about her claim that she was forced into marriage. This was the heart of her appeal. The RAD's findings did not raise a new issue.

C. *Was the RAD's assessment of the evidence unreasonable?*

[20] The Applicant submits that the RAD failed to deal with evidence which contradicted its findings; it erred by applying North American standards without considering the cultural context

of Uganda; and, it failed to give adequate consideration to her explanations for her lack of knowledge about her husband and the absence of pictures or documentary evidence to corroborate that she was indeed married to him. These arguments largely repeat submissions that the Applicant's counsel made to the RAD.

[21] The RAD upheld the RPD's findings in regard to the lack of credibility of the Applicant's claim that she was married. The RAD rejected the Applicant's explanation for the fact that she could not provide basic information about her husband, including his age, what he did for a living, or her failure to provide other evidence to substantiate the marriage, such as pictures of the wedding ceremony, or pictures or documents to confirm that they actually lived together. In addition, the RAD questioned the marriage document she submitted after the RPD hearing, noting that it lacked basic security features and that it contradicted her testimony that she had been unable to obtain it because her husband had it.

[22] I am not persuaded that the RAD's analysis is unreasonable. It is based on the evidence and explanations of the Applicant. The reasoning is clearly explained and grounded in the appropriate considerations for assessing credibility, and it reflects the advantage that the RPD, and then the RAD, have in assessing credibility (*Rahal v Canada (Citizenship and Immigration)*, 2012 FC 319). Applying the framework set out in *Vavilov*, I find that the RAD's reasons cogently explain the rationale for the decision, when read in light of the legal framework for its decision and the evidentiary record. That is what reasonableness review in this context requires, and I find that there is no basis to disturb the findings of the RAD.

IV. Conclusion

[23] For these reasons, the application for judicial review is dismissed.

[24] There is no question of general importance for certification.

JUDGMENT in IMM-6518-18

THIS COURT'S JUDGMENT is that:

1. The application for judicial review is dismissed.
2. There is no question of general importance for certification.

“William F. Pentney”

Judge

FEDERAL COURT
SOLICITORS OF RECORD

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APPEARANCES:

Ashish Duvadie
Emma Skowron

FOR THE APPLICANT
FOR THE RESPONDENT

SOLICITORS OF RECORD:

Duvadie Law Office
Barristers and Solicitors
Ottawa, Ontario

Attorney General of Canada
Ottawa, Ontario

FOR THE APPLICANT

FOR THE RESPONDENT