Federal Court  Cour fédérale

Date: 20200324

Docket: IMM-2845-19

Citation: 2020 FC 409

Ottawa, Ontario, March 24, 2020

PRESENT: The Honourable Mr. Justice LeBlanc

BETWEEN:

LEANDRA RENEE

Applicant

and

MINISTER OF CITIZENSHIP AND IMMIGRATION

Defendant

REASONS FOR JUDGMENT

[1] This is a judicial review application of a decision of the Refugee Appeal Division [RAD], confirming the decision of the Refugee Protection Division [RPD] that the Applicant is neither a Convention refugee nor a person in need of protection pursuant to sections 96 and 97 of the *Immigration and Refugee Protection Act*, SC 2001 c 27 [Act]. Both boards concluded that the Applicant lacked credibility and that she had failed, therefore, to establish a reasonable fear of persecution or a forward-looking threat should she return to her country of nationality,

Saint Lucia. They also both concluded, in the alternative, that the Applicant had failed to rebut the presumption of state protection.

[2] The Applicant arrived in Canada, from Saint Lucia, on November 2, 2008 as a visitor. After the expiration of her six-month visa, she continued to live in Canada, without status. In 2014, she filed an in-Canada application for permanent residence on humanitarian and compassionate grounds [H&C Application] essentially claiming that she would face financial hardship in Saint Lucia. Said application was denied in April 2015.

[3] In September 2016, the Applicant sought refugee protection, claiming that she would be harmed or killed by her former boyfriend if she were to return to Saint Lucia. In particular, she alleged that her former boyfriend began physically abusing her shortly after she met him in 2005 and became, out of sheer jealousy, increasingly violent afterwards to the point of wrestling her to the ground in 2007 after he noticed that she greeted her brother's friend who was passing by. She said that the police intervened on the scene and interrogated her, but that no further state intervention ensued. She also claimed that her former boyfriend had friends in the police force and that each time she would call them, they would not show up.

[4] The RPD found the Applicant's refugee claim not credible because of her failure to seek asylum for eight years, or inquire about how to regularize her status for years on end. It also had credibility concerns over the fact that the Applicant failed to include in her Basis of Claim form that, at some point in 2012 or 2013, her former boyfriend had threatened to kill her if she returned to Saint Lucia, and had not made any threats in the three years preceding the filing of

said claim. In the alternative, the RPD held that it would have refused the Applicant's claim in any event as she had failed to establish by clear and convincing evidence that the authorities in Saint Lucia would be unwilling or incapable of protecting her.

[5] The RAD concluded that the RPD had not erred in its overall credibility assessment, being of the view that, while not determinative, the eight-year delay it took the Applicant to make her refugee claim could lead to a negative credibility determination. The RAD also found the Applicant's explanation for not seeking refugee protection sooner that she "was just living" and that she "[did not] think about that" did not alleviate the credibility concerns regarding her claim. Such delay, according to the RAD, brought the Applicant's subjective fear into question, since her failure to take steps to regularize her status placed her at risk of deportation to the country where the alleged agent of persecution currently lives. Said behaviour, according to the RAD, was inconsistent with someone who fears for her life should she return to her country of nationality and thus undermined her credibility.

[6] The RAD also considered that the Applicant's failure to mention the domestic violence she suffered as a contributing hardship factor in her H&C Application undermined her credibility, as she had at that time, an opportunity to mention that hardship factor but did not do so. It further found that the fact that she did not even mention it to the immigration consultant who was assisting her at the time also had an undermining effect on her credibility.

[7] On state protection, the RAD also found that the Applicant had not provided clear and convincing evidence that the authorities in Saint Lucia would be unable or unwilling to protect

her. The RAD reviewed the report which concluded that while police officers are willing to arrest offenders, domestic violence crimes are only prosecuted when the victims press charges. It noted in that regard that according to this report, financial security is often a key impediment for victims to press charges. However, while acknowledging that there are many reasons why a victim of domestic violence may not press charges, the RAD noted that in this case, the Applicant had not established being financially dependent on her former boyfriend.

[8] The RAD also noted the mixed evidence about the overall effectiveness of the measures in place in Saint Lucia to prevent and cope with domestic violence. However, the RAD concluded that the legislative and procedural framework, along with the available measures implemented by the police and other state authorities demonstrated that protection is operationally effective and available in Saint Lucia. Since the Applicant was not able to explain why she does not trust the police or the courts to protect her, nor give credible evidence establishing that her former boyfriend has connections with the police, the RAD found that state protection would be reasonably available to her.

[9] The Applicant claims that the RAD's decision should be set aside for a number of reasons. First, she argues that the RAD erred in making a negative credibility finding based on her failure to include, in her H&C Application, her fear of persecution in Saint Lucia. Such an analysis, according to the Applicant, is fundamentally flawed since section 25(1.3) of the Act prohibits immigration officers from considering refugee considerations when assessing H&C applications.

[10] Second, the Applicant submits that it was unreasonable for the RAD to draw a negative inference regarding her credibility based on her failure to mention to her immigration consultant the domestic violence she allegedly suffered. The Applicant claims that victims of domestic violence would go to extreme lengths to avoid the mere thought of reliving such abuse and would rather suppress such painful memories rather than airing them out in front of an immigration tribunal, unless left with no other options.

[11] Third, the Applicant submits that the RAD committed a reviewable error in assigning significant weight to unreliable and biased sources to support its finding that there is adequate state protection in Saint Lucia and in discounting, in so doing, the unbiased opinion from a lawyer describing the police response to domestic violence claims in that country as "generally not effective". More generally, the Applicant argues that the RAD's finding on state protection fails to provide sufficiently clear, precise and intelligible reasons, depriving her thereby with the possibility to understand the grounds on which said finding is based.

[12] Lastly, the Applicant contends that the RAD breached the rules of procedural fairness in failing to provide her with an opportunity to respond to its concerns regarding her failure to provide credible evidence of her former boyfriend's alleged connections with the police, and in failing to consider the documentary evidence she submitted, which contradicts the RAD's state protection and credibility findings.

[13] The Applicant is raising procedural fairness and reasonableness issues. It is not contested that the former is reviewable on a standard of correctness (*Canada (Citizenship and*

Immigration) v Khosa, 2009 SCC 12 at para 43) whereas the latter is reviewable on a standard of reasonableness (*Canada (Citizenship and Immigration) v Vavilov*, 2019 SCC 65 at para 16-17 and 25 [*Vavilov*]; *Idugboe v Canada (Citizenship and Immigration)*, 2020 FC 334 at para 18; *Cao v Canada (Citizenship and Immigration)*, 2020 FC 337 at para 17). As it is well established, the correctness standard does not attract any deference from the reviewing Court, whereas the standard of reasonableness does.

[14] Here, I am satisfied that the RAD's credibility findings regarding the Applicant's fear of persecution should she return to Saint Lucia "bears the hallmarks of reasonableness – justification, transparency and intelligibility …" (*Vavilov* at para 99). It is worth reminding at this point that in applying the reasonableness standard, a reviewing court "does not ask what decision it would have made in place of the administrative decision maker, attempt to ascertain the "range" of possible conclusions that would have been open to the decision maker, conduct a de novo analysis or seek to determine the "correct" solution to the problem". The reviewing court will only consider "whether the decision made by the administrative decision maker – including both the rationale for the decision and the outcome to which it led – was unreasonable" (*Vavilov* at para 83).

[15] Given that the RAD's credibility finding is determinative of the present matter, there is no need to address the issues raised by the Applicant regarding the RAD's subsidiary state protection determination (*St. Croix v. Canada (Citizenship and Immigration)*, 2019 FC 461 at para 26).

[16] As indicated previously, the Applicant's main contention regarding the RAD's credibility findings regarding her forward-looking fear of persecution is that it based these findings on the fact that she failed to include the basis of said fear in her H&C Application. Such an analysis, according to the Applicant, is fundamentally flawed and amounts to an "egregious error of law" as immigration officers seized of H&C applications are barred by section 25(1.3) of the Act from considering refugee considerations.

[17] Subsection 25(1) of the Act requires the Respondent, on request of a foreign national in Canada who is inadmissible or who does not meet the requirements of this Act, to examine the circumstances concerning that foreign national. Upon such examination, the Respondent may grant the foreign national permanent resident status or an exemption from any applicable criteria or obligations of this Act if he/she is of the opinion that it is justified by humanitarian and compassionate considerations relating to the foreign national, taking into account the best interests of a child directly affected.

[18] According to section 25(1.3) of the Act, when an immigration officer, on behalf of the Respondent, is considering an H&C application, he/she may not consider the factors that are taken into account in the determination of whether a person is a Convention refugee or a person in need of protection under section 96 of subsection 97(1) of the Act but he/she "must consider elements related to the hardships that affect the foreign national".

[19] In *Kanthasamy v Canada (Citizenship and Immigration)*, 2015 SCC 61 [*Kanthasamy*], the Supreme Court of Canada made it clear that the hardships that affect the foreign national can be derived from evidence of facts related to refugee protection claims:

> [51] As the Federal Court of Appeal concluded in this case, s. 25(1.3) does not prevent the admission into evidence of facts adduced in proceedings under ss. 96 and 97. The role of the officer making a determination under s. 25(1) is to ask whether this evidence, along with any other evidence an applicant wishes to raise, though insufficient to support a s. 96 or s. 97 claim, nonetheless suggests that "humanitarian and compassionate considerations" warrant an exemption from the normal application of the Immigration and Refugee Protection Act. In other words, the officer does not determine whether a well-founded fear of persecution, risk to life, and risk of cruel and unusual treatment or punishment has been established — those determinations are made under ss. 96 and 97 — but he or she can take the underlying facts into account in determining whether the applicant's circumstances warrant humanitarian and compassionate relief. (*Kanthasamy* at para 51).

[20] This is consistent with the legislative history of the broadly worded "humanitarian and compassionate" provisions in various immigration statutes which suggests that they had "a common purpose, namely, to offer equitable relief in circumstances that "would excite in a reasonable [person] in a civilized community a desire to relieve the misfortunes of another"" (*Kanthasamy* at para 21). This is why immigration officers seized of an H&C application must "consider and give weight to *all* relevant humanitarian and compassionate considerations in a particular case" and ought not fetter their discretion by treating the Ministerial Guidelines designed to assist them in determining whether humanitarian and compassionate considerations warrant relief "as if they were mandatory requirements that limit the equitable humanitarian and compassionate discretion granted by [subsection] 25(1)" (*Kanthasamy* at paras 32-33).

[21] Hence, contrary to the Applicant's contention, subsection 25(1.3) does not prevent an immigration officer from considering the facts underlying a claim for relief under sections 96 and 97 of the Act for the purpose of determining if those facts suggest H&C considerations warranting an exemption from the normal application of the Act (*D'Aguiar-Juman v Canada (Citizenship and Immigration)*, 2016 FC 6 at para 12; *Chaudhary v Canada (Immigration, Refugees and Citizenship)*, 2018 FC 128 at para 41).

[22] Therefore, it was reasonably open to the RAD to expect that the Applicant would mention in her H&C Application, as an element of hardship affecting her, the domestic violence she allegedly suffered from her former boyfriend.

[23] The Applicant also submits that it was unreasonable for the RAD to draw a negative credibility inference from the fact that she failed to mention to her immigration consultant the domestic violence she allegedly suffered. She now claims that she did not disclose that fact because for victims of domestic violence, the mere thought of reliving such abuse is excruciating. These victims, she says, would rather suppress these painful memories rather than airing them out in front of an immigration tribunal, unless left with no other options.

[24] When asked by the RPD member why she had not told her immigration consultant anything about this, the Applicant responded that it was because she was not aware she could apply for refugee protection (Certified Tribunal Record [CTR] at p. 30). Then she was asked why she did not tell her immigration consultant that she had other reasons to fear returning to

Saint Lucia apart from the economic hardship that she had mentioned in her H&C Application and she responded, “I don’t know” (CTR at p. 31).

[25] In the affidavit she signed in support of her judicial review application, the Applicant told a somewhat different story. Indeed, according to her affidavit, she did not mention her previous persecution to her former immigration consultant because it was based on domestic abuse, which, she thought, was a personal matter. She also explained that her consultant simply advised her that H&C applications were fundamentally based on the issue of establishment in Canada (Applicant’s Record at p. 17-18, para 4 to 7).

[26] As the Respondent points out, the Applicant now gives a different and contradictory explanation than the one she offered to the RPD. The Respondent claims that this is further evidence of the Applicant’s lack of credibility. However, more fundamentally, this evidence is new evidence that is not permissible on judicial review. Indeed, as is well established, judicial review focusses on the impugned decision itself and is based on the material that was before the administrative decision-maker. In other words, the record before the Court on judicial review is normally restricted to the evidentiary record that was before the decision-maker. Therefore, evidence that was not before the decision-maker and that goes to the merits of the matter before it is inadmissible on judicial review (*Assn of Universities & Colleges v Canadian Copyright Licensing Agency*, 2012 FCA 22 at para 19; *Morton v Canada (Minister of Fisheries and Oceans)*, 2015 FC 575 at para 36; *Sharma v Canada (Attorney General)*, 2018 FCA 48 at para 8; *Tsleil-Waututh Nation v Canada (Attorney General*), 2017 FCA 128 at para 85-87 and 97).

[27] The governing question here is whether the Applicant acted in a way that is consistent with the fear of persecution she claims. It is well-settled that delay in claiming protection "can be inconsistent with subjective fear because generally one expects a genuinely fearful claimant to seek protection at the first opportunity" (*Kayode v Canada (Citizenship and Immigration)*, 2019 FC 495 at para 29; *Osorio Mejia v Canada (Citizenship and Immigration)*, 2011 FC 851 at para 14-15). Absent a satisfactory explanation as to why protection was not sought at the first opportunity, it is open to the decision-maker to conclude that, despite what the claimant now says, he/she does not actually fear persecution (*Espinosa v Canada (Citizenship and Immigration)*, 2003 FC 1324 at para 17; *Dion John v Canada (Citizenship and Immigration)*, 2010 FC 1283 at para 23 ; *Velez v Canada (Citizenship and Immigration)*, 2010 FC 923 at para 28; *Guecha Rincon v Canada (Citizenship and Immigration)*, 2020 FC 173 at para 19).

[28] I am satisfied, on the basis of the whole record that was before the RAD, that it was reasonably open to it to find that the Applicant had failed to provide a satisfactory explanation for her delay in seeking protection and to draw a negative credibility inference from the fact that she did not mention her fear of persecution to her immigration consultant at the time.

[29] For these reasons, I assert no weight to her counsel's submissions that "[h]er decision to initially suppress the painful memories of the abuse, apply under H&C grounds, and finally submit a refugee claim when she had no other choice but to face her demons, was completely reasonable" as there is no evidence on record, as we have seen, that this was in fact what prompted the Applicant to delay her claim for protection.

[30] I am not questioning the fact that for victims of domestic violence, testifying about the abuse they suffered can be a very painful experience. But here, again, this is simply not what the Applicant claimed to be the reason why she waited eight years to seek protection. She did not even raise that as an explanation for her delay in the affidavit she filed in support of her judicial review application.

[31] Finally, the Applicant submits that the RAD failed to address the documentary evidence she submitted and committed thereby, a reviewable error by making an erroneous finding of fact without regard to the evidence before it. This "evidence", which is listed at paragraph 22 of her written submissions and which consists mostly of decisions from this Court rendered between 2011 and 2013, all ultimately deals with state protection in a context of domestic violence. None of that "evidence" deals with the RAD's main finding that the Applicant has not established, with sufficient trustworthy or credible evidence, that she faces a forward-looking risk of harm or persecution if she is to return to Saint Lucia.

[32] As I indicated previously, there is no need here, given my conclusion as to the reasonableness of the RAD's main finding, to address the issues raised by the Applicant in connection with state protection. Since the argument that the RAD made an erroneous finding of fact without regard to the evidence before it has no bearing on the RAD's main finding, it does not advance the Applicant's case.

[33] I note, at this juncture, that in a recent asylum case involving a citizen of Saint Lucia seeking Canada's protection on grounds of domestic violence, this Court refused to interfere with

the RPD's finding that state protection was available to the applicant in that case. In particular, while acknowledging that the documentary evidence relating to the treatment of domestic and gender violence in Saint Lucia was mixed, the Court dismissed the applicant's contention that the RPD had erred in focussing on evidence of government efforts to reduce domestic abuse to the exclusion of evidence indicating that those efforts had not translated into real protection (*Noellien v Canada (Citizenship and Immigration)*, 2018 CF 1010 at para 29-30).

[34] All this to say that if, some years ago, there appeared to be a consensus that adequate state protection was generally not available in Saint Lucia and other Caribbean countries for victims of domestic abuse, as appears from some of the cases submitted to the RAD by the Applicant (*Modeste v Canada (Citizenship and Immigration)*, 2013 FC 1262 at para 34; *Corneau v Canada (Citizenship and Immigration)*, 2011 FC 722, at para 8 to 12), things appear to have favorably evolved since.

[35] The Applicant's judicial review application will therefore be dismissed. There is no question for certification raised by the parties. I agree that none arises.

JUDGMENT in file IMM-2845-19

THIS COURT'S JUDGMENT is that:

1. The application for judicial review is dismissed;

2. No question is certified.

"René LeBlanc"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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