Federal Court  Cour fédérale

Date: 20200820

Docket: IMM-5653-19

Citation: 2020 FC 838

[ENGLISH TRANSLATION]

Ottawa, Ontario, August 20, 2020

PRESENT: The Honourable Mr. Justice Roy

BETWEEN:

PHIDELINE JEAN

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

[1] Phideline Jean is seeking judicial review of a decision by the Refugee Appeal Division [RAD] dated August 27, 2019. The application for judicial review is brought pursuant to section 72 of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [the Act].

[2] This entire case revolves around the credibility of the applicant, who claims to be seeking protection in Canada because she fears abuse at the hands of an individual who is referred to here as "Dr. Jims." This individual is said to have links to a criminal group called "Base Kosovo."

I. Facts

[3] The applicant is a citizen of Haiti. She completed her medical studies in Cuba and practised her profession in Haiti between October of 2013 and 2016.

[4] The applicant's difficulties began on April 19, 2016, when the managers of the hospital where she practised appointed her head of the maternity ward. Another doctor, St-Hilaire Jims, was angry about the appointment, however, because he also apparently coveted it. Rocks were thrown into the hospital courtyard on April 22, 2016. This was followed by anonymous threats of death and rape. The applicant filed a complaint with the Ferrier peace court on May 3, 2016. In her complaint, she identified her attackers as Haitian-trained doctors who were opposed to Cuban-trained doctors. There was no mention of an appointment to a position of responsibility. In fact, the applicant referred to criminals, without identifying them, who allegedly made threats and physically attacked her [TRANSLATION] "with their handgun."

[5] With the threats intensifying, the applicant left Haiti in February 2017. She arrived at the Canadian border in April 2017 and filed a claim for refugee status.

[6] Since the only issue before the Court is the applicant's credibility, and she is seeking judicial review of the RAD's decision on the basis that its findings were unreasonable, it is

important to present those findings. This will allow for further elaboration on the facts alleged by the applicant and a determination on the reasonableness of the decision.

II. The RAD decision

[7] The decision of the RAD is articulate. The RAD agreed with the Refugee Protection Division [RPD] in not believing the applicant's "story." The decision sets out the reasons the applicant's credibility is undermined with regard to certain important elements of her narrative.

[8] While she claims to have been threatened and to have received many anonymous threatening calls, she is inconsistent as to the nature of the threats and the reasons they were directed at her. In her Basis of Claim Form [BOC Form], Ms. Jean stated that she had received anonymous threats to the effect that she would be killed no matter where she was in Haiti. Yet before the RPD, she spoke in terms of about 100 calls threatening her if she returned to a specific location, Trou-du-Nord, the place where she practised medicine and where Dr. Jims coveted her position. Therefore, it was the potential return to the place where she practised medicine that posed a problem for her persecutors, who she claimed wanted her to stay away, leaving the position vacant. This inconsistency was pointed out to the applicant, who was unable to provide a satisfactory explanation.

[9] Similarly, the applicant contradicts herself on the identity of her persecutors. Before the RPD, it was a colleague from the Trou-du-Nord hospital (Dr. Jims) who threatened her because he coveted her new position in the maternity ward. However, when she arrived in Canada, and in a complaint she filed in a Haitian court, Ms. Jean identified her persecutors as all doctors who

had studied in Haiti. Apparently, these Haitian doctors held a grudge against the applicant because she had studied in Cuba. Here again, the applicant was asked to explain what appears to be a contradiction. Her explanation was that Dr. Jims had threatened to burn down her parents' home if she referred to him by name, while at the port of entry, the cold and stress were responsible for her silence. The RAD notes that the identity of the persecutor is the very basis of the claim: it is Dr. Jims who allegedly wanted to harm the applicant, which obviously makes the threat she received personally all the more real. There is a significant difference between claiming Haitian doctors as her persecutors and identifying an individual with a specific motive.

[10] Before the RPD, the applicant indicated that a patient at the hospital where she was practising in 2014 was a member of a gang called "Base Kosovo," and that members of a rival group went to the hospital to injure him. The applicant claimed that it was because of this incident that she was able to recognize members of "Base Kosovo." However, in her BOC Form, she said the opposite: that members of the "Base Kosovo" gang broke into the hospital to attack a patient. The explanation given by the applicant at the RPD hearing was that there were two patients. Clearly, this explanation ultimately only adds to the inconsistencies.

[11] The RAD also noted that the applicant did not leave Haiti for the United States until February 9, 2017, even though she claimed to be receiving constant threats (approximately 100 anonymous threatening calls). She came to Canada to make a refugee claim more than two months later, on April 18, 2017. In addition, she reportedly made several trips to Cuba and the Dominican Republic between April 2016 and February 2017 to escape the threats, returning to Haiti each time in the hope that things would improve. According to the RAD, this is not the

behaviour of a person fearing for her life, and it should be taken into consideration in the assessment of a refugee protection claim (RAD decision, para 33). The RAD writes in paragraph 34 of its decision:

> [34] In this case, given the numerous death and rape threats she claims to have received since April 2016 and the hundred or so death threats via anonymous telephone calls she claims to have received in Cap-Haïtien, her city of refuge, staying in Haiti for work is not consistent with the behaviour of someone who fears for their safety and their life in their country. My own view is that, given the seriousness of the threats and the dangerous nature of her agent of persecution or of the alleged harm, a man with ties to the PHTK party in power and associated with the base Kosovo criminal gang, the fact that the appellant waited until February 9, 2017, to leave her country undermines her credibility. The RPD's finding is correct.

The RAD did not accept her explanations for why she returned to her country of nationality after having left for Cuba or the Dominican Republic because of the threats against her. For the RAD, this was not a satisfactory explanation given the seriousness of the threats and the alleged risk to her life in her country.

III. Arguments and analysis

[12] The decision in *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 [*Vavilov*] establishes that the reviewing court "must develop an understanding of the decision maker's reasoning process in order to determine whether the decision as a whole is reasonable. To make this determination, the reviewing court asks whether the decision bears the hallmarks of reasonableness—justification, transparency and intelligibility—and whether it is justified in relation to the relevant factual and legal constraints that bear on the decision: *Dunsmuir*, at paras. 47 and 74; *Catalyst*, at para. 13" (para 99). The burden is obviously on the applicant to

demonstrate the unreasonableness of the administrative tribunal's decision. Indeed, for a decision to be found unreasonable, not just any shortcoming will do. The reviewing court must be satisfied that "there are sufficiently serious shortcomings in the decision such that it cannot be said to exhibit the requisite degree of justification, intelligibility and transparency. Any alleged flaws or shortcomings must be more than merely superficial or peripheral to the merits of the decision. . . . Instead, the court must be satisfied that any shortcomings or flaws relied on by the party challenging the decision are sufficiently central or significant to render the decision unreasonable" (para 100).

[13] As the Court noted in *Vavilov*, a lack of internal rationality or a decision that is in some respect untenable in light of the relevant factual and legal constraints that bear on it would lead to a finding of unreasonableness. Thus, the applicant would have had to demonstrate internally incoherent reasoning or an untenable decision. It should be added that a measure of deference continues to be accorded to decisions of administrative tribunals. Paragraph 75 of *Vavilov* reads as follows:

> [75] We pause to note that our colleagues' approach to reasonableness review is not fundamentally dissimilar to ours. Our colleagues emphasize that reviewing courts should respect administrative decision makers and their specialized expertise, should not ask how they themselves would have resolved an issue and should focus on whether the applicant has demonstrated that the decision is unreasonable: paras. 288, 289 and 291. We agree. As we have stated above, at para. 13, reasonableness review finds its starting point in judicial restraint and respects the distinct role of administrative decision makers. …

[14] The applicant's argument is essentially that she disagrees with the understanding of the case demonstrated by the RPD and the RAD. What is lacking, with respect, is an explanation as

to why the RAD's decision does not meet the requirements of justification, intelligibility and transparency. The applicant states that she has amply demonstrated a reasonable fear (factum, para. 7); but much more is required of those who bear the burden of demonstrating that a decision is unreasonable. She alleges that there is a culture of vengeance in Haiti, as well as corruption and lack of follow-up by Haitian authorities. Even if that were sufficient, which is far from certain, no evidence is offered in this regard. At best, the applicant claims to have filed a complaint, which as everyone knows, does not corroborate the allegations since it is not independent evidence and does not establish the risk that she is alleging. At the end of the day, the applicant has not demonstrated in any way that the RAD's decision is unreasonable, other than to maintain that her story is true.

[15] There were indeed contradictions and inconsistencies in the versions provided by the applicant and this Court cannot agree that the RAD was unjustified in reaching the conclusion that it did; its reasons for decision provide intelligibility and transparency.

[16] The applicant made the point that her delay in leaving Haiti, despite what she described as persistent threats, should not be an automatic bar to making a refugee claim, that there could be reasons for such a delay. However, no one is suggesting that the subjective fear of persecution is determinative in this case. It is, at best, just another element that has been added.

[17] The RAD may make findings of credibility based on implausibilities, common sense and reason. But the inferences must be reasonable and be clearly and explicitly articulated. Similarly, it should not undertake a microscopic examination with a view to identifying the slightest

inconsistency. In this case, the RAD listened to the recording of the hearing before the RPD, and reached the same conclusion as the RPD. The decision under review clearly explains, in my view, the reasons the applicant's credibility was undermined. In these matters, burden of proof is paramount. It is up to an applicant to prove reasonableness. The reviewing court does not substitute its judgment for that of the administrative tribunal: it reviews reasonableness. It was up to the applicant to show how the RAD's finding was unreasonable, which she did not do.

[18] Accordingly, the application for judicial review must be dismissed. I agree with the parties that there are no serious questions of general importance requiring certification.

JUDGMENT in IMM-5653-19

THE COURT'S JUDGMENT is as follows:

1. The application for judicial review is dismissed.

2. No serious question of general importance is certified.

"Yvan Roy"
Judge

Certified true translation
This 21st day of September 2020.

Francie Gow, BCL, LLB

FEDERAL COURT

SOLICITORS OF RECORD

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