Federal Court  Cour fédérale

Date: 20210114

Docket: IMM-1000-20

Citation: 2021 FC 55

[ENGLISH TRANSLATION]

Ottawa, Ontario, January 14, 2021

PRESENT: The Honourable Mr. Justice Pentney

BETWEEN:

MARIE DANIELLE PINET CALIXTE
GAEL BRADLEY PINET
GAMAELLE PINET

Applicants

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

[1] The applicants are seeking judicial review of a decision rendered on January 27, 2020, by the Refugee Appeal Division (RAD), which confirmed the determination of the Refugee Protection Division (RPD), dated December 7, 2018, rejecting the applicants' refugee protection claims.

I. Background

[2] The applicants, Marie Danielle Pinet Calixte (principal applicant) and her two minor children, are citizens of Haiti. The principal applicant alleges that she would fear for her life for reasons of her political opinion should she return to Haiti. The associated applicants are basing their fears on that of the principal applicant.

[3] On March 2, 2012, the principal applicant criticized Michel Martelly's government in front of her co-workers. Two of her co-workers, who did not appreciate her criticisms, verbally threatened her and accused her of wanting to destabilize the government. She stated that after that incident she distanced herself from those two colleagues. In May 2012, another co-worker, who had intervened on her behalf, told her that it would be better if she kept quiet because her persecutors had information about her family.

[4] A few years later, in November 2015, the principal applicant attended a protest against the Michel Martelly government, where she apparently saw one of the co-workers who had threatened her. She claims that he made death threats against her. Then, on January 22, 2016, when she was leaving the market, she was physically assaulted by two men who threatened to [TRANSLATION] "finish her off". Although she was unable to identify her attackers, the principal applicant alleges that this was retaliation from her colleague.

[5] On May 4, 2016, the principal applicant heard another threat against her, and on July 14, 2016, the applicants left Haiti. They spent a few months in the United States before claiming refugee protection in Canada.

[6] On December 7, 2018, the RPD rejected the refugee protection claims on the ground that the principal applicant's testimony was not credible.

[7] The applicants appealed to the RAD, raising two issues. They alleged that the RPD's credibility assessment was unreasonable and that the RPD had not reasonably assessed the principal applicant's behaviour.

[8] On January 27, 2020, the RAD dismissed their appeal and confirmed the RPD's decision that the applicants were neither refugees under section 96 nor persons in need of protection under section 97 of the *Immigration and Refugee Protection Act*, SC 2001, c 27. Although the RAD also rejected the applicants' refugee protection claims, it did not confirm all of the RPD's findings. The applicants are seeking judicial review of that decision.

II. Issues and standard of review

[9] There are two issues in this case:

A. Was there a breach of procedural fairness?

B. Was the RAD's decision reasonable?

[10] The first issue regarding the breach of procedural fairness requires an approach based on the correctness standard. The reviewing court must ask "whether the procedure was fair having regard to all of the circumstances" (*Canadian Pacific Railway Company v Canada (Attorney General)*, 2018 FCA 69 at para 54).

[11] With respect to the second issue, based on the principles reviewed in *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 at paras 10, 16 and 17 [*Vavilov*], the

standard of review for RAD decisions is presumed to be reasonableness. None of the exceptions covered by *Vavilov* apply in the circumstances (see *Ogbonna v Canada (Citizenship and Immigration)*, 2020 FC 180 at para 14, and *Al Bardan v Canada (Immigration, Refugee and Citizenship)*, 2020 FC 733 at para 9).

III. Analysis

A. *Was there a breach of procedural fairness?*

[12] The applicants submit that the RPD member's comments at the hearing created a reasonable apprehension of bias. They argue that the RPD must avoid any conduct that may be interpreted as constituting a reasonable apprehension of bias and that "the appearance of impartiality of the Canadian refugee protection system must be reflected *on a day-to-day basis* and in *how* the members of the Refugee Protection Division prepare, hear and decide cases" (emphasis in the original; *Kalombo Kabongo v Canada (Citizenship and Immigration)*, 2011 FC 1106 at paras 33 to 36 [*Kalombo Kabongo*]). They submit that the RAD erred in not accepting this argument.

[13] The applicants note that the RAD summarized the key points of this issue in its decision:

> [13] However, on listening to the hearing, I noticed that the RPD demonstrated a lack of sensitivity on several occasions. First of all, the RPD, for its part, wanted to argue about semantics when it stated that the appellant could not call herself an orphan because she did not lose her parents at birth. It then told the appellant that if she did not understand a question it was important that she speak up so that it could rephrase the question, but it went on to lecture her when she requested clarification about a question. Lastly, it made a completely inappropriate comment to the appellant when it told her: [translation] "There is no way that you can have the

> slightest degree of intelligence and not understand my question."
> . . .
>
> [Citations omitted.]

[14] The applicants submit that the apparent bias is reflected in the RPD's findings in its reasons. They maintain that the RAD should have considered the RPD's comments in this respect as evidence of the apparent bias and that the breach of this principle of natural justice warrants the Court's intervention.

[15] I am not convinced.

[16] First, I accept that the standards set out in *Kalombo Kabongo* apply to the RPD. Decisions rendered by the RPD and the RAD deal with vital issues regarding the interests and safety of refugee protection claimants. It is essential that the decision maker's conduct provide no reasonable ground to fear that there was bias.

[17] However, it is well settled that the issue of a tribunal's bias must be alleged at the earliest practical opportunity (*Canada (Human Rights Commission) v Taylor*, [1990] 3 SCR 892). As explained by Justice Stratas in *Maritime Broadcasting System Limited v Canadian Media Guild*, 2014 FCA 59 at para 67 (cited with approval in *Taseko Mines Limited v Canada (Environment)*, 2019 FCA 320 at para 47),

> [a]n applicant must raise an alleged procedural violation at the earliest practical opportunity. The earliest practical opportunity is where "the applicant is aware of the relevant information and it is reasonable to expect him or her to raise an objection."
>
> [Citations omitted.]

[18] In this case, the applicants are raising this argument for the first time before this Court. I note that counsel for the applicants did not take the opportunity to raise it at the hearing before the RPD when, or immediately after, the RPD made the above comments. In addition, counsel for the applicants did not raise the issue when the hearing continued after a one-day break, an opportunity for counsel to think about how the hearing was going.

[19] I also note that the applicants did not raise this issue before the RAD. The only reference to overzealousness in their written submissions to the RAD is the argument that the RPD [TRANSLATION] "was zealous in finding contradictions in the evidence or in the appellant's behaviour" (Amended CTR, at page 44). I agree with the respondent that this does not suggest that the applicants tried to pursue the argument of bias before the RAD.

[20] Even if I agreed to assess the merits of this argument, I am not satisfied that the RPD's intemperate comments rise to the level necessary to establish a reasonable apprehension of bias in light of the record as a whole (*R v S (RD)*, [1997] 3 SCR 484 at paras 113–114; *Yukon Francophone School Board, Education Area #23 v Yukon (Attorney General)*, 2015 SCC 25 at paras 25 and 26). The first day of the hearing before the RPD did not go well. The principal applicant had a great deal of difficulty, so much so that the RPD agreed to adjourn the hearing because she was not feeling well. The RPD clearly found the principal applicant's testimony somewhat hard going. Even the interpreter raised concerns about being able to continue interpreting given the principal applicant's conduct at the hearing and the fact that she repeatedly asked the interpreter to answer the member's questions in a manner that went beyond interpretation. In agreeing to adjourn the hearing on December 5, 2018, because the principal applicant was not feeling well, the RPD noted that measures should be taken to ensure that the

principal applicant feel comfortable. At the start of the hearing on December 7, 2018, the RPD asked her if she was able to proceed, and the transcript of that hearing shows that the second day went well.

[21] The context in which the hearing took place must be taken into account in evaluating the RPD's comments. In this case, the Supreme Court of Canada's comments in *Miglin v Miglin*, [2003] 1 SCR 303 at paragraph 26, applies: "We see no reason to interfere with the Court of Appeal's assessment of the record, nor with its conclusion that although the trial judge's comments were intemperate and his interventions at times impatient, they do not rise to the level necessary to establish a reasonable apprehension of bias."

[22] I agree with the RAD that the RPD showed a lack of sensitivity on several occasions, but I am not satisfied that, in the context of the hearing, its comments are sufficient to support an apprehension of bias on the part of the RPD. Rather, they indicate a certain degree of impatience with the principal applicant's testimony during a difficult hearing.

[23] The applicants submit that the fact that the second day went better than the first, that is, without inappropriate comments from the RPD, is insufficient to overcome the apprehension of bias on the part of the panel. They claim that the RPD's comments on the first day indicate that the RPD had a closed mind with respect to their refugee protection claims.

[24] I am not convinced. Although the first day of the hearing did not go well for the reasons stated above, when counsel for the applicant told the RPD that the principal applicant was not feeling well, the RPD adjourned the hearing for the day. The second day went better, and the RPD did not make any inappropriate comments. The hearing transcript and the RPD's reasons

for decision do not suggest reasonable grounds to question whether the panel was biased. A full review of the record therefore does not establish a reasonable apprehension of bias.

[25] For all of these reasons, I am not satisfied that there was a breach of procedural fairness.

B. *Was the RAD's decision reasonable?*

[26] The applicants submit that the RAD erred in confirming the RPD's findings that the principal applicant's behaviour was not in line with her fear for her life.

[27] The RAD confirmed the RPD's determination that the principal applicant's credibility regarding her fear for her life was undermined by her behaviour following the threats from her colleagues. The principal applicant testified that she began receiving threats in March 2012. She kept her distance, and in May 2012, co-workers told her that they would not do anything to her as long as she kept quiet and did not criticize President Martelly. However, in November 2015 the threat escalated when a colleague saw her at a protest against the Martelly government and told her that he would have her hide.

[28] The RAD noted that the principal applicant took no precautions to protect herself at that time, nor did she change her habits. The principal applicant testified that, starting in January 2016, she began to really fear for her life and that she then took precautions. She lodged a complaint with the police, and in May 2016, after being informed of other threats, she took refuge at her cousin and her friend's home. She did return to work after the threats, but her persecutors worked in a different department and they rarely crossed paths. The applicants left their country only after the children finished school.

[29] The RAD summarized its findings on this issue in its decision:

> [18] I am of the opinion that the appellant did not behave like a person who feared for her life, by continuing to return to her home, by not changing her routines, and by keeping the same job. Asked by the RPD why she did not leave Haiti sooner, the appellant stated that the associate appellants were in school and that she did not want to upset them. I am of the opinion that this is not a reasonable explanation for a person who fears for her life. In fact, nothing explains why she took such a risk—the risk of being killed—so that her children could finish school.

[30] The applicants submit that, contrary to the RAD's findings, the principal applicant did not have to take precautions in November 2015 after receiving death threats. As the applicant explained in her account, she believes that intimidation should not always win, especially when one has a good cause that one firmly believes in. The applicant still thought that her persecutors were just trying to intimidate her to dissuade her from her cause, and she wanted to show them that intimidation did not work with her.

[31] In addition, the applicants submit that the precautions must be analyzed as of January 22, 2016, because that is when, according to the principal applicant, she began to fear for her life. She took measures to protect herself, including filing a complaint with the police, and began staying at other places. At that time, she had no other choice but to continue working because she had no other way to support her family.

[32] The applicants submit that the RAD's analysis is unreasonable because it does not take into account the principal applicant's personal qualities or the situation in the country. As stated by Justice Hugessen in *Yusuf v Canada (Minister of Employment and Immigration)*, [1992] 1 FC 629, 133 NR 391 (FCA) at p 632: "The definition of a refugee is certainly not designed to exclude brave or simply stupid persons in favour of those who are more timid or

more intelligent.” In this case, the applicants argue that the RAD erred in basing itself on a reasonable person’s imagined reaction instead of considering the principal applicant’s explanation based on her perception of the risk and her reaction to the threats.

[33] I am not convinced.

[34] The case law states that the inconsistency of a refugee claimant’s conduct with the alleged fear is a relevant factor in assessing credibility (*Pan v Canada (Minister of Employment and Immigration)* (1994), 49 ACWS (3d) 568, [1994] FCJ No 1116 (QL) (FCA); *Caballero v Canada (Minister of Employment and Immigration)* (1993), 154 NR 345, [1993] FCJ No 483 (QL) (FCA)). In addition, the Court must treat these findings with a great deal of deference because the RAD and the RPD are specialized administrative tribunals mandated by Parliament to assess the credibility of refugee protection claims presented before them (*Noël v Canada (Citizenship and Immigration)*, 2020 FC 281 at paras 16, 20; *Rahal v Canada (Citizenship and Immigration)*, 2012 FC 319 at para 42 [*Rahal*]). If credibility findings are based on the testimony being implausible, “[the] finding of implausibility must be rational and must also be duly sensitive to cultural differences. It must also be clearly expressed and the basis for the finding must be apparent in the tribunal’s reasons” (citations omitted, *Rahal* at para 44).

[35] In this case, I am of the view that no intervention is warranted on this issue. I am of the opinion that the applicants are merely asking the Court to reassess the evidence and to reconsider the issues in their favour. That is not the Court’s role in judicial review.

[36] Based on the framework for reasonableness review established in *Vavilov*, a reviewing court’s role “is to review the reasons given by the administrative decision maker and determine

whether the decision is based on an internally coherent chain of reasoning and is justified in light of the relevant legal and factual constraints" (*Canada Post Corp v Canadian Union of Postal Workers*, 2019 SCC 67 at para 2). The burden is on the party challenging the decision to show that it is unreasonable. It is not sufficient to establish flaws that are superficial or peripheral to the merits of the decision. As stated by the majority in *Vavilov* at paragraph 100, "[i]nstead, 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."

[37] I am not satisfied that the applicants have shown such a fatal error in the RAD's decision. The RAD considered the facts, including the fact that the principal applicant testified that she began to fear for her life in January 2016 yet she did not move from her home, change her job or routine, or take other measures to try to protect her children. The RAD also noted the principal applicant's testimony that her husband, who is a police officer in Haiti, gave her no advice regarding her safety. The RAD found that it was "implausible that a police officer who knows that his wife has been receiving death threats from colleagues for several years would have done nothing to keep his family safe" (Reasons for Decision at para 21).

[38] The RAD's determination is based on facts relevant to the analysis, and the RAD properly explained its conclusion on this issue. The applicants failed to establish that the RAD failed to take an essential fact into account in its analysis, and whether the RAD correctly applied the relevant law to the decision is not at issue.

[39] The RAD's analysis is clear and based on the applicable facts and law. That is all that the reasonableness standard requires. I agree that a different decision maker might have come to a

different conclusion on the basis of the facts. However, that in itself is not sufficient for me to overturn the RAD's decision.

[40] For all these reasons, I find that no intervention is warranted.

IV. Conclusion

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

[42] There is no question of general importance to be certified.

JUDGMENT in IMM-1000-20

THE COURT'S JUDGMENT is as follows:

1. The application for judicial review is dismissed.

2. There is no question of general importance to be certified.

"William F. Pentney"
Judge

Certified true translation
Johanna Kratz, Reviser

FEDERAL COURT

SOLICITORS OF RECORD

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