Federal Court Cour fédérale

Date: 20211108

Docket: IMM-82-21

Citation: 2021 FC 1194

[ENGLISH TRANSLATION]

Ottawa, Ontario, November 8, 2021

PRESENT: The Honourable Mr. Justice Roy

BETWEEN:

RACHELE SAINTIL

Applicant

and

MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

<u>JUDGMENT AND REASONS</u>

[1] The applicant, Rachele Saintil, is seeking judicial review of the decision of the Refugee Appeal Division [RAD] in her case. The application for judicial review is being made pursuant to section 72 of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA or the Act].

The applicant had appealed a decision of the Refugee Protection Division [RPD] (which had rejected the applicant's claim for refugee protection) before the RAD.

[2] As all parties are aware, the application for judicial review can only be against the decision of the RAD and it is therefore the reasons given by the RAD that we will focus on.

I. Preliminary issue

[3] Counsel for the applicant had some technical difficulties with his computer, and thus had to proceed by telephone conference rather than by videoconference using the Zoom platform.

[4] Counsel for the respondent offered to turn off her camera so that she, too, would use only the telephone function. Counsel for the applicant indicated that this would not be necessary. The hearing therefore proceeded on a teleconference basis for the applicant's counsel while respondent's counsel remained on screen. No advantage was gained from this arrangement.

II. The facts

[5] The facts of this case are very simple. Essentially, the applicant's fear stems from threats made against her brother while he was working for the United Nations Stabilization Mission in Haiti (MINUSTAH).

[6] The applicant's brother was subjected to extortion threats. These threats, five in number, took place between March 17, 2017, and May 30, 2017. The threats were made to the applicant's

brother without her direct involvement. From what we know about these incidents, a number of individuals approached the applicant's brother and demanded money, sometimes in exchange for promises of protection, sometimes for ammunition they said they needed because they were due to be at war in the next few days; sometimes they asked directly whether the money demanded was ready, and sometimes they issued more direct threats, such as when two men on a motorcycle threatened that if the money was not paid, the applicant's brother would be responsible. After these four threats, the applicant's brother decided to move, but it appears that the criminals were able to find his new address because a letter was placed on the windshield of his car. The letter gave him 72 hours to deposit the money and warned that if the money was not deposited, anything could happen to him.

[7] It was then that the applicant's brother filed a complaint at the local police station in his place of residence. Unable to count on security measures to be taken by MINUSTAH, he decided to leave Haiti to come to Canada and claim refugee protection. He left Haiti on July 26, 2017, and arrived in Canada on July 28, 2017.

[8] The connection between the applicant's brother and the applicant is that the brother, as well as his wife and two children, had welcomed the applicant into their home.

[9] The applicant's brother and his family were the subject of an RPD decision allowing their claim for refugee protection. This was on December 10, 2018. The reasons for the decision were transcribed six days later. As for the applicant, her claim for refugee protection was heard by a

different panel of the RPD and, as noted earlier, was denied on October 23, 2019. She appealed to the RAD. It is from this decision that judicial review is being sought.

III. The decision under review

[10] The RAD concluded, as had the RPD, that the refugee protection claim could not be allowed. The decision was issued on December 21, 2020. The RAD conducted its own analysis of the evidence, asserting that it had listened to the RPD hearing and had had the full record before it.

[11] A reading of the RAD's decision reveals that the RAD addressed three issues:

(a) Were the rules of natural justice properly applied?
(b) Is there a prospective risk to the applicant's safety if she were to return to Haiti?
(c) Is there a fear of persecution based on the applicant's gender?

[12] The first issue for the RAD to consider was whether the applicant had been denied natural justice in the RPD's finding her generally credible but questioning her fear of persecution if she were to return to Haiti. In essence, as I understand it, it was alleged that the applicant had not been afforded the most fundamental rule of administrative law, the right to be heard (*audi alteram partem*).

[13] This contention was rejected by the RAD. A litigant's right to procedural fairness refers to a person's right to know what to prove (to know the allegations against the person), and to have a meaningful opportunity to present the person's case. The RAD found that Ms. Saintil had

been provided with an opportunity to present her case before the RPD, stating at paragraph 37 of its decision:

> [37] Listening to the recording of the hearing, the RAD noted that the RPD asked the appellant questions to assess the prospective risk to which she would be subjected in the event of returning to Haiti. It sought to determine, for example, why the criminals would target her, whether there had been any incidents since her departure and whether the appellant feared anyone other than these criminals. In so doing, the RPD allowed the appellant to explain the various reasons as to why she would be subjected to a prospective risk or have a reasonable fear of persecution as a member of the particular social group of women.
>
> [Footnotes omitted]

[14] Contrary to some of the applicant's contentions, the various documents she seeks to rely on were before the RPD. While the applicant sought to rely on the jurisprudence of this Court (*Kirichenko v Canada (Citizenship and Immigration)*, 2011 FC 12), the RAD noted that that decision dealt with the RPD's use of documents not adduced into evidence. That was not the case here. The RPD did not consider material that had not been filed into the evidentiary record before it (it appears that the dispute revolved around Tab 2.5 of the National Documentation Package). Section 170 of the Act expressly provides for the right to present evidence, question witnesses and make representations. This was what happened here.

[15] Thus, it was not so much that the applicant was denied refugee protection because she was not credible. Rather, it was because the evidence submitted did not meet the threshold required under the law. Where the applicant's submissions fell short was not in respect of credibility generally. Rather, it was that the evidence was not sufficient because it did not establish a risk to the applicant. The evidence was believed, but it was not enough. The rules of

natural justice were not breached according to the RAD. In any event, the issue has not been raised on judicial review.

[16] As for the prospective risk, it must be recognized that the applicant was relying on her brother's claim for refugee protection. The problem for the applicant was that the intimidation of the brother and his subsequent claim for refugee protection did not involve her. Indeed, aside from the fact that the applicant was staying with her brother's family in Haiti, there was no connection to the threats made specifically against the brother, which were tantamount to extortion. The RAD fully agreed with the RPD regarding the fear expressed by the applicant. The RAD wrote as follows at paragraph 53 of its decision:

> [53] The RPD considered the following facts: the appellant's brother no longer lives in Haiti, he has not worked for MINUSTAH in more than two years, the appellant would not be living with her brother if she returned to Haiti, the criminals had not threatened her directly, they had only threatened her brother, the appellant had not established that the criminals knew her or knew that she was living with her brother, and she was not aware of any particular incidents that had occurred since her departure that would lead her to believe that the criminals would target her. When asked to explain why the criminals would go after her, the appellant responded that due to the Haitian culture and the fact that people would talk about her when she returned to Haiti, she would be very fearful that the criminals would come after her or kidnap her for ransom.

[17] Paragraph 97(1)(b) of the IRPA requires an objective assessment of prospective risk rather than simply a subjective assessment of an applicant's concerns. The applicant did not discharge this burden of proof. According to the RAD, the RPD accurately reported the facts the applicant submitted into evidence. Thus, the RAD agreed with the RPD and found that "as a whole, these . . . facts [did] not lead to a conclusion that the criminals would have the interest or

motivation to look for the appellant. The evidence shows that the criminals did not know that she was living with her brother, did not know her, had never met her, had never threatened her and were unaware of her ties to her brother" (para 58). The mere fact that the RAD recognized the use of word of mouth in Haiti was not enough for the applicant to discharge the burden of proving, on a balance of probabilities, that the criminals would target her. The RAD concluded that there was no evidence that the applicant would be targeted by the threats allegedly received by her brother.

[18] Lastly, the RAD considered the issue of fear of gender-based persecution. Since the applicant did not seek judicial review on this issue, there is no need to elaborate at this stage. Suffice it to quote from paragraph 82 of the RAD decision, which I believe summarizes the considerations well. This passage is taken from the section of the RAD decision discussing persecution of the applicant based on her gender:

> [82] The appellant had the burden of establishing that she faces a serious possibility of persecution because she belongs to the particular social group of women. Based on the personal situation described by the appellant, the RAD is of the view that she failed to do so.

IV. Arguments and analysis

[19] The applicant has identified two issues that she intends to raise to succeed on judicial review. The first issue relates to prospective risk, while the second deals with an internal flight alternative in Haiti. No one disputes that the standard of review is reasonableness.

[20] The applicant appears to be questioning her burden. She complains that the RAD set a threshold that her testimony alone could not be sufficient to discharge her burden. The applicant appears to be arguing that her testimony alone should suffice.

[21] This is a dubious proposition in law in my view, because it lacks nuance. The testimony of one person can be sufficient, but not necessarily so. It is certainly possible to make a case that can be established simply by the testimony of a single person. But the content of that testimony must be sufficient. I refer to paragraph 53 of the RAD decision, which is reproduced in paragraph 16 of these reasons. The RPD's findings listed in paragraph 53 were accepted by the RAD and have not even been challenged in this case. For a decision to be unreasonable, much more is required than the applicant has sought to demonstrate.

[22] A reasonable decision has the following hallmarks: justification, transparency and intelligibility, taking into account the relevant factual and legal constraints. As stated in *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 [*Vavilov*], the burden of showing that a decision is unreasonable rests on the applicant. Such a burden implies that "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" (para 100).

[23] In this case, this demonstration is far from having been made. What completely undermines the applicant's argument is the complete absence of evidence as to whether the

criminals who sought to extort the brother knew about her relationship with her brother, as was noted by the RPD and the RAD. Therein lies the rub: the lack of objective evidence as to the applicant's expressed fear. Moreover, no serious flaws in the RAD's decision have been demonstrated. The decision under review does not lack internal rationality and is certainly defensible on the basis of the evidence presented, which constitutes a factual constraint.

[24] The same can be said of the second argument that was presented to this Court on judicial review. I agree with the respondent that, strictly speaking, no internal flight alternative determination was made. It is much more that the applicant had family in the part of Haiti in question, which made the risk of gender-based persecution much less present. In addition, the presence of family there, family the applicant believed would welcome her with open arms, would make the transition easier. The RAD noted that the family would be there for the applicant. Given that the prospective risk was not positively demonstrated, it followed of course that the possibility of moving to another region of Haiti (Port-de-Paix) where she could live with family, as the applicant herself said, appears eminently reasonable.

[25] For every argument, the applicant maintains that there is a serious possibility of persecution if she were to return to Haiti where the criminals who had a grudge against her brother could easily track her down given the presence of word of mouth in Haiti. While one may have sympathy for the applicant's situation, it must be acknowledged that she has never made any demonstration that would show that the decision as formulated was unreasonable. I repeat: it was not proven that the connection that the applicant claims to have with her brother's family is known by the criminals who tried to extort her brother. According to the evidence, their

interest in the applicant's brother was based on their ability to extort him, which is not the case for the applicant. The criminals' lack of knowledge of the applicant is fatal.

[26] There was no internal flight alternative determination in the RAD decision, and the applicant failed to establish gender-based persecution, as discussed by the RAD.

[27] The role of a reviewing court is not to substitute its own preferred outcome for the decision an of administrative tribunal. On the contrary, the reviewing court owes deference to administrative decisions, which involves applying the principle of judicial restraint and demonstrating respect towards them (*Vavilov* at paras 13 and 14).

[28] It follows that the application for judicial review must be dismissed. The particular facts of this case do not give rise to a serious question of general importance. Indeed, the parties have agreed that there is no question to be certified.

JUDGMENT in IMM-82-21

THIS COURT'S JUDGMENT is as follows:

1. The application for judicial review is dismissed.

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

"Yvan Roy"

Judge

Certified true translation
Johanna Kratz

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-82-21
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