Federal Court Cour fédérale

Date: 20230419

Docket: IMM-335-22

Citation: 2023 FC 569

Montréal, Quebec, April 19, 2023

PRESENT: Mr. Justice Gascon

BETWEEN:

IRMA URBEKHASHVILI

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Overview

[1] The applicant, Ms. Irma Urbekhashvili, is a citizen of Georgia and Portugal. In a decision dated November 18, 2021 [Decision], the Refugee Appeal Division [RAD] rejected her appeal of the Refugee Protection Division [RPD] decision, which had denied her and her two daughters' claims for refugee protection, finding that she would receive adequate state protection in Portugal.

[2] Ms. Urbekhashvili now seeks judicial review of the RAD's Decision. She submits that the RAD erred in reviewing the breaches of procedural fairness allegedly committed by the RPD, notably the appointment of incompetent designated representatives [DR] to assist her and her daughters before the RPD, the refusal to appoint her husband as the DR for her children, and the rejection of her applications to call certain witnesses.

[3] For the following reasons, Ms. Urbekhashvili's application for judicial review will be dismissed. The RAD's finding on state protection in Portugal is determinative of this case and remains undisputed by Ms. Urbekhashvili. Moreover, the reasons provided by the RAD show that it considered the evidence on the record and Ms. Urbekhashvili did not demonstrate that the Decision contains any serious procedural flaws that would make it unreasonable.

II. Background

A. *The factual context*

[4] Ms. Urbekhashvili, originally from Georgia, moved to Portugal with her husband, Mr. Ilia Beriashvili, in 2008. While in Portugal, she obtained Portuguese citizenship and had two daughters. A few years later, after separating from her husband, she moved back to Georgia and began a relationship with Mr. Shalva Gloveli, a dual Georgian and Portuguese citizen.

[5] Ms. Urbekhashvili alleges that she was the victim of physical abuse on multiple occasions when she lived with Mr. Gloveli.

[6] Because of the domestic violence she suffered at the hands of Mr. Gloveli, Ms. Urbekhashvili travelled to Canada in September 2015. Her husband, Mr. Beriashvili, had

previously moved to Canada. Ms. Urbekhashvili wanted to reunite with him and escape the persecution by her new partner, Mr. Gloveli. She claimed refugee protection for herself and for her daughters on October 13, 2015.

[7] Ms. Urbekhashvili claims that, in May 2016, Mr. Gloveli allegedly travelled to Portugal and threatened Ms. Urbekhashvili's former neighbours to disclose her whereabouts.

[8] The RPD first determined that Ms. Urbekhashvili was unable to appreciate the nature of the legal proceedings and thus appointed DRs for her and her children. A DR's role is to help a refugee claimant put their best case forward. Ms. Marina Konokhova acted as DR for Ms. Urbekhashvili, while Ms. Ana Bernal acted for the children. They were eventually replaced by Mr. Norris Ormston and Ms. Vivian Garofalo, respectively. Despite some procedural complications with the DRs, the RPD found that these issues were not relevant to the final determination of the case. Ultimately, the RPD found that no state protection was available in Georgia, but that Ms. Urbekhashvili and her daughters would receive adequate state protection in Portugal. The RPD therefore denied their claims for refugee protection.

B. ***The RAD Decision***

[9] In the Decision, the RAD first separated Ms. Urbekhashvili's claim from the claims of her daughters. Therefore, the Decision — and this application for judicial review — only concerns Ms. Urbekhashvili's claim for refugee protection. In her appeal, Ms. Urbekhashvili focused on the procedural issues relating to the appointment of DRs for her and her daughters and the rejection of her applications to call witnesses. She did not challenge the RPD's determination on state protection.

[10] The RAD confirmed the RPD’s conclusions. It held that the DRs acted competently and did not negatively influence the outcome of the RPD proceedings. Contrary to Ms. Urbekhashvili’s argument, the RAD found that she did not establish that one of the DRs, Ms. Bernal, lost witness statements that were relevant to the appeal. According to the RAD, those statements sought to corroborate the May 2016 incident with Mr. Gloveli. However, the RAD held that this event was already established. Therefore, whether or not these witness statements were available was irrelevant to the proceeding. In addition, the alleged incompetence of the DRs with the translation of documents was not considered as such by the RAD, which found that it was reasonable for a DR to request a short delay to have documents translated.

[11] On the issue of the RPD’s refusal to appoint Mr. Beriashvili as the children’s DR, the RAD found that it is ultimately up to the RPD to designate a DR. The RAD further held that the RPD acted correctly in refusing Ms. Urbekhashvili’s request to designate him as a DR, since he did not understand the responsibilities of a DR and was not prepared to act in the best interests of the children. Further, on the challenge to the constitutional validity of subsection 167(2) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA], which refers to the ability of a Division from the Immigration and Refugee Board to appoint a DR, the RAD held that the argument was without merit. The role of a DR does not extend to custodial rights or other matters within the jurisdiction of the family court, contrary to what Ms. Urbekhashvili argued.

[12] The RAD further held that the RPD’s refusal to call Ms. Urbekhashvili’s parents as witnesses was correct because their testimony would not have relevant or probative value in relation to state protection in Portugal, which was the determinative issue in the proceeding.

[13] Finally, on the issue of state protection, the RAD held that the evidence demonstrates that Portugal adequately protects victims of domestic violence. According to the RAD, Ms. Urbekhashvili did not turn to Portuguese authorities before seeking international protection and she did not rebut the presumption of available state protection in Portugal. The RAD concluded that the procedural issues during the RPD proceedings did not affect the outcome of the proceedings, as it found that the determinative issue was that Ms. Urbekhashvili would receive adequate state protection in Portugal and none of the procedural issues influenced this finding.

[14] Ms. Urbekhashvili first applied for the judicial review of the RAD's Decision as a self-represented litigant and provided her own memorandum of fact and law. It was only on March 14, 2023, about a month before the hearing in this Court, that Mr. Victor Pilnitz — who was counsel for Ms. Urbekhashvili before the RAD — was appointed as solicitor of record for Ms. Urbekhashvili before this Court. Mr. Pilnitz did not submit additional written submissions.

C. *The standard of review*

[15] The Minister of Citizenship and Immigration [Minister] suggests that the applicable standard of review is reasonableness. I agree. The procedural issues raised by Ms. Urbekhashvili are not "[breaches] of procedural fairness on the part of the RAD, but rather concerns the RAD's assessment of the RPD decision on the issue. Therefore, the issue should be reviewed under the reasonableness standard" (*Omisore v Canada (Citizenship and Immigration)*, 2022 FC 444 at para 3).

[16] Reasonableness is the presumptive standard that reviewing courts must apply when conducting judicial review of the merits of administrative decisions (*Canada (Citizenship and Immigration) v Vavilov*, 2019 SCC 65 [*Vavilov*] at para 17). I further underline that, prior to *Vavilov*, the courts had already determined that the standard of reasonableness was applicable to issues dealing with the application of the test of adequacy of state protection to a particular factual situation (*Hinzman v Canada (Citizenship and Immigration)*, 2007 FCA 171 at para 38; *Burai v Canada (Citizenship and Immigration)*, 2020 FC 966 at para 17; *Ruszo v Canada (Citizenship and Immigration)*, 2018 FC 943 at para 16).

[17] Where the applicable standard of review is reasonableness, the role of a reviewing court is to examine the reasons given by the administrative decision maker and to determine whether the decision is based on "an internally coherent and rational chain of analysis" and is "justified in relation to the facts and law that constrain the decision maker" (*Vavilov* at para 85). The reviewing court must therefore consider whether the "decision bears the hallmarks of reasonableness — justification, transparency and intelligibility" (*Vavilov* at para 99). Both the outcome of the decision and its reasoning process must be considered in assessing whether these hallmarks are borne (*Vavilov* at paras 15, 95, 136). The reviewing court must be knowledgeable of the factual and legal constraints upon the decision maker (*Vavilov* at paras 90, 99), without "reweighing and reassessing the evidence" before it (*Vavilov* at para 125).

[18] A judicial review must include a rigorous evaluation of administrative decisions. However, as part of its analysis of the reasonableness of a decision, the reviewing court must begin its inquiry by examining the reasons provided with "respectful attention," and seeking to understand the reasoning process followed by the decision maker to arrive at its conclusion

(*Vavilov* at para 84). The reviewing court must adopt an attitude of restraint and intervene "only where it is truly necessary to do so in order to safeguard the legality, rationality and fairness of the administrative process" (*Vavilov* at para 13).

[19] The onus is on the party challenging the decision to prove that it is unreasonable. Flaws must be more than superficial for the reviewing court to overturn an administrative decision. The court must be satisfied that the reasons contain a fundamental gap or an unreasonable chain of analysis, and that there are "sufficiently serious shortcomings" (*Vavilov* at para 100).

III. Analysis

[20] As noted by the Minister, the RAD's finding on the availability of state protection in Portugal is determinative of the case and remains undisputed by Ms. Urbekhashvili, who focuses her arguments on procedural issues.

[21] In her written submissions, Ms. Urbekhashvili mainly challenges the RPD's findings and essentially reiterates the arguments she had already presented, unsuccessfully, to the RAD (Certified Tribunal Record, at pages 709–716). Ms. Urbekhashvili takes particular issue with the RAD's findings concerning the DRs and the refusal to call her parents as witnesses. I will address each of these arguments in turn.

A. *The competence of the DRs*

[22] The Court described the DR's role in *Bukvic v Canada (Citizenship and Immigration)*, 2017 FC 638 at paragraph 20 as follows:

> Subsection 167(2) of the IRPA provides that a representative is designated in cases where a refugee claimant is under 18 years of age or is unable to appreciate the nature of the proceedings. The designation process and the responsibilities of the representative are set out in section 20 of the *Refugee Protection Division Rules*, SOR/2012-256. According to these provisions, the designated representative must act in the best interests of the claimant and act in the place of the claimant where the claimant is not able to do so due to age or for other reasons (*Aguirre v Canada (Citizenship and Immigration)*, 2015 FC 281 at para 53).

[23] Ms. Urbekhashvili challenges the RAD's findings on the decision not to appoint Mr. Beriashvili as the children's DR and, more generally, the incompetence of the DRs Ms. Bernal, Ms. Konokhova, and Ms. Garofalo.

(1) **Refusal to appoint Mr. Beriashvili as the children's DR**

[24] Ms. Urbekhashvili argues that the RPD and the RAD "stripped the father of the children of his custodial rights" by refusing him the right to act as the children's DR. I pause to note that the Court does not have to address this argument in this application for judicial review, as the children's claims were separated from Ms. Urbekhashvili's claim at the RAD, and this proceeding does not relate to these claims. In any event, I find that Ms. Urbekhashvili's argument has no merit.

[25] The appointment of a person as a DR is totally independent of that person's custodial rights. As the RAD duly noted at paragraph 29 of the Decision:

> The role of designated representatives appointed during RPD proceedings is to assist claimants in putting their best case forward by making important decisions relating to counsel, the claim, processing procedures, gathering evidence, and filing and perfecting an appeal. The role of designated representatives is

> confined to the RPD proceeding in question and does not extend to custody decisions or other family court matters.

[26] The RPD's refusal to appoint Mr. Beriashvili as the children's DR therefore has no impact whatsoever on his custodial rights.

[27] Furthermore, in the process of selecting a DR, the RPD and the RAD must "assess the person's ability to fulfil the responsibilities of a designated representative" and "ensure that the person has been informed of the responsibilities of a designated representative" before designating a person as a representative (subsection 20(9) of the *Refugee Protection Division Rules*, SOR/2012-256 [RPD Rules]). Here, the RAD held that the RPD correctly determined that Mr. Beriashvili did not understand the responsibilities of a DR and was not prepared to act in the best interests of the children, "as he was only willing to share evidence relating to his children's claim if his request to be a DR was accepted" (Decision at para 24).

[28] Ms. Urbekhashvili has failed to demonstrate how such finding is unreasonable, and I cannot identify any evidence in the record suggesting that the RAD erred in concluding as it did. On the contrary, as illustrated by counsel for the Minister at the hearing before this Court, all the evidence on the record instead confirms the correctness of the RAD's findings regarding Mr. Beriashvili.

(2) **Incompetence of appointed DRs**

[29] Ms. Urbekhashvili claims that Ms. Bernal, Ms. Konokhova, and Ms. Garofalo were all incompetent DRs. Specifically, Ms. Urbekhashvili alleges that Ms. Bernal's incompetence was demonstrated when she lost witness statements that would have been relevant to the proceedings.

Ms. Urbekhashvili also complained about Ms. Bernal's incompetence when she refused to recognize the conflict of interest that allegedly arose when Ms. Urbekhashvili sued Ms. Bernal in Small Claims Court for the loss of documents. Further, Ms. Urbekhashvili maintains that Ms. Garofalo (who replaced Ms. Bernal) was incompetent because she retained counsel for Ms. Urbekhashvili's children without her authorization and because this counsel had a conflict of interest, which she failed to identify. Finally, Ms. Urbekhashvili argues that Ms. Bernal and Ms. Konokhova were both incompetent because they first refused to have French documents translated into English.

[30] I am not persuaded by Ms. Urbekhashvili's arguments.

[31] First, at the risk of repeating myself, since Ms. Urbekhashvili's claim was separated from her children's claims at the RAD, Ms. Urbekhashvili's complaints against Ms. Bernal and Ms. Garofalo are not relevant in this application for judicial review because they each solely acted as a DR for the children.

[32] Second, I am of the view that Ms. Urbekhashvili failed to identify any reviewable error with the RAD's conclusions regarding the loss of witness statements, prepared by Ms. Urbekhashvili's former neighbours, concerning the May 2016 incident with Mr. Gloveli. First, it was reasonable for the RAD to find no persuasive evidence that the documents were actually sent to Ms. Bernal, as Ms. Urbekhashvili failed to submit further proof of the alleged shipment, such as a tracking number or report. The RAD also reasonably concluded that, in any event, no prejudice resulted from the unavailability of the documents, since the May 2016 incident — to which the alleged lost witness statements related — was undisputed.

[33] Third, Ms. Urbekhashvili argues that the RAD misapprehended the issue of the incompetence of the DRs, which was not revealed through the delay in requesting the translation of documents from French to English, but rather by: 1) failing to recognize the conflict of interest that was created when Ms. Urbekhashvili sued Ms. Bernal in Small Claims Court; and 2) by taking an adverse position to her own on the attribution of translation costs (Memorandum of the Applicant at para 16). Accordingly, the DRs would have failed to meet their responsibilities under paragraphs 20(10) (b) to (g) of the RPD Rules.

[34] I find this argument to be without merit.

[35] Exhibit H — dealing with Ms. Bernal’s alleged failure to acknowledge the conflict of interest — does not demonstrate that Ms. Bernal refused to acknowledge the possibility of a conflict of interest. Rather, the exchange of emails in Exhibit H merely shows Ms. Konokhova’s attempt to clarify the situation with Ms. Urbekhashvili’s counsel and to understand what documents he was referring to when he claimed that Ms. Bernal was in a conflict of interest. With respect, it does not demonstrate that Ms. Bernal purportedly refused to withdraw despite an alleged clear conflict of interest. Further, since Ms. Garofalo has replaced Ms. Bernal and Mr. Ormston has replaced Ms. Konokhova as DRs, any alleged breach of procedural fairness due to Ms. Bernal or Ms. Konokhova’s incompetence was remedied before the RPD hearing took place. I see no error in the RAD’s reasoning on this point: the alleged procedural issues either did not influence the outcome of the RPD proceedings, or they were remedied before the RPD hearing or by the RAD in its Decision.

[36] The same applies to the translation issue. Despite some delays with the translation, the French documents were eventually translated before the RPD hearing. Therefore, there was no adverse impact on the fairness of the procedure itself.

[37] In sum, I am not persuaded that the RAD erred in determining that the DRs acted competently and did not negatively influence the outcome of the RPD proceedings. Again, I conclude that Ms. Urbekhashvili has failed to demonstrate how the DRs' actions adversely affected the fairness of the proceedings before the RPD or the RAD, or how they affected the RAD's state protection finding, which is determinative in this case. Accordingly, I am satisfied that the Decision is reasonable on this issue.

B. *RPD's refusal to call witnesses*

[38] Ms. Urbekhashvili relies on *Tabatadze v Canada (Citizenship and Immigration)*, 2016 FC 24 [*Tabatadze*] to argue that the RPD and the RAD could not refuse the evidence of her parents. Again, I am not convinced by the argument.

[39] The *Tabatadze* decision stands for the principle that evidence filed by an applicant's family and relatives cannot be refused for no other reason than that it is self-serving. Here, Ms. Urbekhashvili's application to call her parents as witnesses was not refused on the basis that it was self-serving. Rather, the RPD refused the evidence because it was neither relevant nor probative for the proceedings. The evidence on the record shows that the purpose of the parents' testimonies was to testify about continuous threats of Mr. Gloveli and the unavailability of state protection in Georgia and Portugal. The threats were accepted by the RPD based on other evidence and the RPD acknowledged that state protection was unavailable in Georgia. The RPD

further determined that Ms. Urbekhashvili's parents could not be of any assistance on the issue of state protection in Portugal, a country they had never been to. There was therefore no reason to call them as witnesses.

[40] In its Decision, the RAD reviewed all the written statements from Ms. Urbekhashvili's parents and similarly concluded that they did not provide any relevant or probative information on state protection in Portugal, which was the determinative issue (Decision at paras 32, 35). The RAD found that the witness statements of Ms. Urbekhashvili's parents did not "describe or discuss any incidents or experiences in Portugal that could influence the determinative issue of State Protection in Portugal" (Decision at para 34).

[41] In my view, there is nothing unreasonable in the RAD's analysis and determination on this point. Ms. Urbekhashvili has failed to point to any evidence that her parents (who are not citizens of Portugal and have never been there) may have brought on the issue of state protection in that country and she has not demonstrated why the RAD's finding on that front was not justified, transparent, and intelligible. At the hearing before the Court, counsel for Ms. Urbekhashvili argued that Ms. Urbekhashvili's parents had relevant and probative evidence on state protection in Portugal. Further to my review of the record, I find no support whatsoever for this affirmation. The record instead confirms the RAD's conclusion that the testimonies of Ms. Urbekhashvili's parents would offer no first-hand evidence on the issue of state protection in Portugal.

[42] For all of the above reasons, I conclude that Ms. Urbekhashvili has failed to meet her burden of proof with regard to the unreasonableness of the Decision (*Vavilov* at para 100). Ms. Urbekhashvili's arguments instead reflect her continued disagreement with the RPD's and

the RAD's determinations. This is not sufficient to allow the Court to intervene, as a reviewing court's role is not to reweigh and reassess the evidence (*Vavilov* at para 125; *Canada (Canadian Human Rights Commission) v Canada (Attorney General)*, 2018 SCC 31 at para 55).

[43] The RAD did not omit nor misinterpret any evidence. On the contrary, the Decision is based on an internally coherent analysis and takes into consideration the relevant facts (*Vavilov* at para 105). To allow the reviewing court to intervene, an applicant must identify errors that are "more than merely superficial or peripheral to the merits of the decision" (*Vavilov* at para 100). Here, Ms. Urbekhashvili has failed to identify any such error or any significant flaw in the RAD's reasoning.

IV. Conclusion

[44] For the above-mentioned reasons, Ms. Urbekhashvili's application for judicial review is dismissed. According to the reasonableness standard, it is sufficient for the Decision to be based on an inherently coherent and rational analysis, and to be justified having regard to the legal and factual constraints to which the decision maker is subject. This is the case here, as the Decision constituted a reasonable outcome based on the law and the evidence, and the RAD's determinations on all procedural issues flagged by Ms. Urbekhashvili have the requisite attributes of transparency, justification, and intelligibility. Moreover, Ms. Urbekhashvili does not challenge the RAD's substantive finding on the availability of state protection in Portugal.

[45] The parties do not propose a question for certification, and I agree that none arises.

JUDGMENT in IMM-335-22

THIS COURT'S JUDGMENT is that:

1. This application for judicial review is dismissed, without costs.

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

"Denis Gascon"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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