

Federal Court



Cour fédérale

Date: 20230428

Docket: IMM-2084-22

Citation: 2023 FC 621

Ottawa, Ontario, April 28, 2023

PRESENT: Mr. Justice Diner

BETWEEN:

JOSEPHINE DIB

Applicant

and

**MINISTER OF CITIZENSHIP AND
IMMIGRATION**

Respondent

JUDGMENT AND REASONS

[1] The Applicant seeks judicial review of a decision of the Refugee Appeal Board [RAD] confirming the determination of the Refugee Protection Division [RPD] that she is not a Convention refugee under s. 96 of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA] nor a person in need of protection under s. 97 of the IRPA. For the reasons that follow, I will dismiss the Application.

I. Background

[2] The Applicant is a 61-year-old citizen of Lebanon. She claimed protection in Canada on the basis that she fears conjugal violence at the hands of her husband, and family violence at the hands of her son.

[3] The Applicant married her husband when she was 16 years old and went to live with him and his family in Kuwait. She lived there with her husband from February 1977 to January 1991. She claims that her husband abused her and cheated on her since the start of their marriage.

[4] In January 1991, the Applicant returned to Lebanon with her three children. Her husband remained in Kuwait. While living in Lebanon, she learned that her husband had cheated on her with other women.

[5] In July 1994, the Applicant returned to Kuwait with her children to live with her husband. She stated that she returned for financial reasons.

[6] In June 2013, the Applicant returned to Lebanon with her children, leaving her husband behind in Kuwait.

[7] In 2014, the Applicant claims her husband developed health problems and his brother sent him to join the Applicant and their children in Lebanon so that she could look after him. The

Applicant stated she felt obligated to take care of her husband because he had no one to look after him and the children were sympathetic to their father.

[8] The Applicant's son married in 2017 and lived with his wife in the Applicant's home after his marriage. The Applicant claims that he repeated the same behaviour as his father and was verbally and physically abusive towards her – striking her on January 15, 2020 – but that she never filed a complaint nor sought protection from the authorities in Lebanon.

[9] On January 27, 2020, the Applicant arrived in Canada on a visitor's visa. She joined her adult daughter who has lived in Canada for more than 12 years.

[10] On December 11, 2020, the Applicant filed a claim for protection.

[11] On May 19, 2021, the RPD rejected the Applicant's claim for protection, finding that her allegations were not credible due to her vague and evasive testimony, contradicting evidence, and her behaviour that was determined to be incompatible with her alleged fear.

[12] The Applicant appealed the RPD decision to the RAD alleging a breach of procedural fairness stemming from her former representative's incompetence in failing to inform her that he was not a lawyer and that her daughter could have testified at the hearing before the RPD.

[13] On February 7, 2022, the RAD dismissed the Applicant's appeal [Decision]. After considering a written submission from the Applicant's former representative responding to the

allegations of incompetence, the RAD concluded that there was no breach of procedural fairness and that the RPD did not err in determining the Applicant's allegations were not credible.

II. Preliminary Issue

[14] The Respondent argues that the Court should not consider the affidavit of the Applicant's daughter filed on February 6, 2023 [Further Affidavit]. The Respondent submits that the Further Affidavit contains additional information, which was not in the Applicant's daughter's affidavit dated October 21, 2021 and which was before the RAD.

[15] Generally, only evidence that was before the decision-maker is admissible on judicial review (*Association of Universities and Colleges of Canada v Canadian Copyright Licensing Agency (Access Copyright)*, 2012 FCA 22 at paras 17–18). I agree with the Respondent that the Applicant has provided no explanation to justify (i) why the information contained in the Further Affidavit was not included in the affidavit that was before the RAD; or (ii) how the Further Affidavit falls within any of the exceptions to the enumerated by the Federal Court of Appeal in *Namgis First Nation v Canada*, 2019 FCA 149 at paragraph 10. The Further Affidavit is not admissible and I decline to consider it.

III. Analysis

[16] The Applicant raises two issues in the case at hand: (i) that there was a breach of procedural fairness due to the incompetence of her former immigration consultant; and (ii) that the Decision was unreasonable.

[17] The issue of procedural fairness is to be reviewed by asking whether the process leading to the Decision was fair in all the circumstances (*Canadian Pacific Railway Company v Canada (Attorney General)*, 2018 FCA 69 at paras 54-55; see also *Singh v Canada (Citizenship and Immigration)*, 2023 FC 215 at para 6), while the second issue is to be reviewed on a standard of reasonableness in accordance with the principles set out by the Supreme Court of Canada in *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65.

A. *There was no breach of procedural fairness by either the RPD or the RAD.*

[18] The Applicant argues that there was a breach of procedural fairness, because she was inadequately represented by her former immigration consultant, who failed to inform her that her daughter could testify before the RPD to corroborate her allegations of spousal and family violence. She claims this resulted in a breach of procedural fairness because the RPD relied on her daughter's absence to determine that the Applicant was not credible.

[19] In her reply, the Applicant alleged new issues of procedural fairness, namely that the RAD was biased and failed to consider all of the evidence when it determined that her allegations of spousal and family violence were vague and evasive.

[20] With respect to the Applicant's allegation of incompetence from her former immigration consultant, the RAD specifically addressed this issue, applying this Court's test in *Rendon Segovia v Canada (Citizenship and Immigration)*, 2020 FC 99 at paragraph 22 for allegations of incompetence from former counsel or a former representative.

[21] The RAD determined that it was reasonable for the former consultant not to have called on the Applicant's daughter to testify, because she had been living in Canada since 2004 and thus was not a witness to her mother's allegations of recent domestic and family violence; and because the former consultant believed that letting the Applicant's daughter testify would deter the Applicant from adequately preparing for the RPD hearing. The RAD did not err in concluding that the Applicant failed to meet the high threshold in establishing allegations of incompetence (*Sidhu v Canada (Citizenship and Immigration)*, 2022 FC 56 at para 20).

[22] Lastly, I note that the RAD referred to the well-established principle that an applicant must live with the consequences of the actions of his counsel (*Singh v Canada (Citizenship and Immigration)*, 2016 FCA 96 at para 66). Given all the circumstances, I find that there was no breach of procedural fairness with regard to the Applicant's former representation.

[23] Moreover, the Applicant's allegation of bias on the part of the RAD is unsubstantiated. She has not pointed to any element in the RAD's Decision that would give rise to a reasonable apprehension of bias (*Committee for Justice and Liberty v National Energy Board*, [1978] 1 SCR 369 at pages 394-395). She claims the RAD did not consider her specific precarious situation, as a victim of domestic abuse in Lebanon, and as a woman who had to protect and provide for her children. However, I find that the RAD's reasons demonstrate that it specifically considered the Applicant's situation, and determined that her ability to provide for her children during the three years they were living in Lebanon, apart from the Applicant's husband, contradicted her claim that she returned to her husband in Kuwait because she needed financial support to provide for her children.

[24] Lastly, I note that procedural fairness arguments should be raised at the earliest opportunity (*Hennessey v Canada*, 2016 FCA 180 at para 21) and that this new issue of bias was only raised by the Applicant in reply.

B. *The RAD's Decision to reject the Applicant's refugee claim due to a lack of credibility is reasonable.*

[25] The Applicant argues that the RAD's finding on her lack of credibility was unreasonable, because she claims the RAD did not appreciate the effects of the trauma she experienced as a victim of domestic and family violence on her testimony before the RPD. The Applicant further challenges the reasonableness of the Decision on the grounds that she was not afforded the right to be represented by a lawyer of her choice since she did not know her former consultant was not a lawyer, nor was she afforded the right to be heard since her daughter was unable to testify before the RPD.

[26] I first note that, as pointed out by the RAD at paragraph 27 of the Decision, that the Applicant did not contest the RPD's findings regarding her credibility issues, specifically (i) her behaviour inconsistent with that of a person in danger when she returned to live with her husband in Kuwait after leaving him, (ii) her vague and superficial testimony, and (iii) her avoiding answering questions concerning her allegations of violence. Thus, the arguments on the issue of credibility are raised for the first time by the Applicant before this Court.

[27] Although I agree with the Respondent that it is not appropriate for this Court to consider new arguments that were not raised before the RAD (*Kanawati v Canada (Citizenship and*

Immigration), 2020 FC 12 at para 23), for the edification of the Applicant, I will address her arguments on credibility and explain why the RAD's findings on that point were reasonable.

[28] First, the Applicant has submitted no evidence to support her claim that her memory was affected by the trauma she experienced as a result of domestic and family violence, and thus she failed to meet her onus to establish this allegation (*Chen v Canada (Citizenship and Immigration)*, 2022 FC 1122 at para 37). I cannot accept this as a reasonable explanation for the Applicant's vague, superficial and inconsistent testimony, which the RPD and RAD reasonably determined undermined her credibility.

[29] I further note that both the RPD and RAD were alive to the sensitive nature of the allegations, and both noted that they had considered and applied the *Chairperson's Guideline 4 on Women Refugee Claimants Fearing Gender-Related Persecution*. The RPD even specifically mentions in its decision that it made sure to ask questions again, and in different ways to ensure the Applicant understood them and had all the latitude she needed to respond, but found that her answers remained vague and superficial.

[30] Second, as previously mentioned, the RAD reasonably determined that the former consultant's decision not to have the Applicant's daughter testify in front of the RPD did not constitute incompetence. The RAD also reasonably addressed the Applicant's argument that she did not know her immigration consultant was not a lawyer by referring to (i) the Basis of Claim Form, (ii) the Use of Representative Form, and (iii) the Retainer agreement between the

Applicant and her former immigration consultant, all of which were signed by the Applicant and all of which clearly indicate that her former representative was a consultant – not a lawyer.

[31] Finally, the RAD concluded, based on its review of the RPD hearing and the RPD decision, that the lack of testimony from the daughter was not determinative. Ultimately, the cumulative effect of the other factors cited by both the RPD and the RAD, including the Applicant's return to her husband on two separate occasions, her vague and superficial testimony, and the contradiction in the evidence about who had "cuffed" her on the ear, were, as the RAD put it, "fatal" to the Applicant's refugee claim.

[32] The Applicant has not demonstrated how the finding of credibility is unreasonable, nor has she pointed to any reviewable error by the RAD in the Decision.

IV. Conclusion

[33] For the above reasons, the Decision was reasonable. The Application for Judicial Review is dismissed. The parties propose no question of general importance for certification, and I agree that none arises.

JUDGMENT in file IMM-2084-22

THIS COURT'S JUDGMENT is that:

1. The judicial review is dismissed.
2. No questions for certification were argued and I agree none arise.
3. There is no award as to costs.

"Alan S. Diner"

Judge

FEDERAL COURT
SOLICITORS OF RECORD

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