Federal Court Cour fédérale

Date: 20240320

Docket: IMM-12554-22

Citation: 2024 FC 447

Ottawa, Ontario, March 20, 2024

PRESENT: Madam Justice McDonald

BETWEEN:

AMANDA ROSE FERGUSON
MAVERICK AARU FERGUSON

Applicants

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

[1] On this judicial review of a decision of the Refugee Appeal Division [RAD], the Applicant and her minor son claim that the RAD erred by failing to properly consider their new evidence and applied the wrong test to the evidence.

I. Background

[2] The Applicant and her minor son are citizens of the Bahamas. They came to Canada in September 2019 after a hurricane destroyed their home in the Bahamas.

[3] Before the Refugee Protection Division [RPD], the Applicant claimed refugee status on the various grounds, including: gender, being a single parent, fear of her son being recruited by gangs, political opinion as she voted for the losing candidate, and the natural disaster. She was self-represented at the RPD hearing.

[4] In February 2022, the RPD rejected all the claims.

[5] On appeal to the RAD, the Applicant claimed refugee status on the grounds of discrimination as a single parent and on the risk of her son being recruited by gangs in the Bahamas. She also claimed a fear of persecution at the hands of her ex-partner's wife who had previously assaulted the Applicant in the Bahamas.

[6] The RAD assessed the new evidence filed by the Applicant. The RAD accepted the new evidence consisting of the Applicant's Affidavit and a psychological report. However, the other new evidence in the form of affidavits from the Applicant's siblings was not accepted by the RAD, who noted that this evidence did not bring any new information to the appeal process and was available at the time the Applicant's record was perfected. The RAD held an oral hearing.

II. Issues and standard of review

[7] The Applicant raises the following issues with the RAD decision:

A. Did the RAD apply the proper test to assess fear of persecution?

B. Did the RAD engage in speculation?

C. Did the RAD fail to consider compelling reasons under subsection 108(3) of *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA]?

[8] The appropriate standard of review for these issues is reasonableness.

III. Analysis

A. *Did the RAD apply the proper test to assess fear of persecution?*

[9] The Applicant argues that the RAD applied the wrong test in assessing the evidence of her risks in returning to Bahamas. She refers to paragraphs 24 and 25 of the decision to argue that the RAD applied the incorrect test, which state:

> [24] The RAD accepts the Principal Appellant's allegations as credible, on a balance of probabilities. The RAD accepts that the Principal Appellant became pregnant with her ex-partner's child, not knowing that her ex-partner was married to his wife. The RAD accepts that the wife physically assaulted, harassed and threatened the Principal Appellant on multiple occasions in 2019 over the phone and while following her in a car.
>
> **Insufficient evidence to demonstrate that there is a forward-looking risk that the wife of the Principal Appellant's ex-partner is still interested in harming the Appellants**
>
> *Wife of ex-partner has not been seen or heard from in three years*

> [25] However, at the time of this appeal, it has been a little over three years since the Principal Appellant has seen or heard anything from the wife or her ex-partner. The RAD finds that there is no forward-looking risk of persecution to the Appellants, if they return to the Bahamas, on a balance of probabilities. The Principal Appellant testified that she came to Canada in September 2019 to start a new life and has since cut herself off from social media contact with her ex-partner and his wife. Since arriving in Canada, the Principal Appellant has no knowledge of any continued threats from the wife, or anyone connected to her. The Principal Appellant believes her ex-partner and his wife are still married after this incident, but does not know for sure. [Footnotes omitted.]

[10] The Applicant argues that she was found to be credible about fear from the wife of her ex-partner thus satisfying section 96 of IRPA, which requires well-founded fear. However, the Applicant argues that it was not appropriate for the RAD to consider the forward-looking risks of persecution — regarding section 97 of IRPA — on the balance of probabilities standard. She submits that she needs only to demonstrate a reasonable possibility of persecution.

[11] In my view, the Applicant's submissions fail to appreciate the distinction between the section 96 and 97 considerations. This distinction was helpfully explained in *Fodor v Canada (Citizenship and Immigration)*, 2020 FC 218 at paragraphs 18 to 20, as follows:

> [18] As is clear from this language, recognition as a Convention refugee under section 96 is based on a fear of persecution based on a Convention ground: race, religion, nationality, social group or political opinion. This fear must be both subjectively held and objectively reasonable to be "well-founded." The latter element requires the claimant to establish, on a balance of probabilities, that there is a "reasonable chance," a "reasonable possibility," or a "serious possibility" of persecution based on a Convention ground should they return: *Tapambwa v Canada (Citizenship and Immigration)*, 2019 FCA 34 at para 4; *Adjei v Canada (Minister of Employment & Immigration)*, , [1989] 2 FC 680 at para 8.

> [19] The Federal Court of Appeal has long held that a claimant to Convention refugee status (a) need not show that they have themselves been persecuted in the past; (b) may show a fear of persecution through evidence of the treatment afforded similarly situated persons in the country of origin; and (c) need not show that they are more at risk than others in their country or other members of their group: *Salibian v Canada (Minister of Employment and Immigration)*, [1990] 3 FC 250, 1990 CanLII 7978 (FCA) at paras 17-19. These principles have been reiterated in cases such as *Pacificador v Canada (Minister of Citizenship and Immigration)*, 2003 FC 1462 at paragraphs 73-75; *Somasundaram v Canada (Citizenship and Immigration)*, 2014 FC 1166 at paragraphs 20-23; and *Bozik v Canada (Citizenship and Immigration)*, 2017 FC 920 [*Bozik I*] at paragraphs 3-7.
>
> [20] Section 97, on the other hand, speaks to the claimant being personally subject to risk of life or cruel and unusual treatment or punishment, and expressly excepts risks faced generally by other individuals in the country: IRPA, s 97(1)(*b*)(ii). An important distinction between the provisions is thus that while section 97 requires a risk that is individual to the claimant, in the sense that it is not faced generally by others in the country, section 96 protection may be based on the existence of a more generalized risk based on a Convention ground that is applicable to the claimant: *Salibian* at paras 18-19; *Somasundaram* at para 24; *Ahmad v Canada (Minister of Citizenship and Immigration)*, 2004 FC 808 at paras 21-22. Section 97 also requires the claimant to establish, on a balance of probabilities, that removal would "more likely than not" subject them to the described risks, rather than the "serious possibility" standard applicable to section 96: *Tapambwa* at para 3.

[12] In this case, the RAD found no serious possibility of risk to the Applicant on a convention ground under section 96. The RAD noted a lack of objective evidence to indicate that single mothers out of wedlock were systemically denied shelter, employment, or a means of existence.

[13] Under section 97, the Applicant was required to establish, on a balance of probabilities, that they would “more likely than not” be subject to risk. Here the RAD was not satisfied based upon the evidence that the Applicant had established this risk.

[14] As the Applicant was not able to establish a claim under section 96, it was reasonable for the RAD to consider the section 97 risks. These are personalized risks that are considered on the balance of probabilities standard.

[15] Although the RAD found the Applicant credible, that alone does not establish a risk where there is no other supporting evidence.

[16] The RAD reasonably considered and weighed the evidence in keeping with the applicable section 96 and section 97 considerations.

B. *Did the RAD engage in speculation?*

[17] The Applicant argues that the RAD engaged in speculation in concluding that she would not face harm from the agent of persecution if she retuned to Bahamas as there was no evidence she had been sought out over a three-year period.

[18] The RAD found insufficient evidence that the wife of her ex-partner remained motivated to harm the Applicant as there had been three years of no contact. The RAD did not accept that there were any economic reasons for the wife of the ex-partner to harm the Applicant. With respect to the alleged political connections of this agent of persecution , the RAD concluded

there was insufficient evidence to demonstrate that this agent had the necessary political connections to recruit powerful individuals to harm the Applicant.

[19] Although the RAD accepted that the Applicant was harassed by this agent in the past, they did not accept that the harassment amounted to persecution meriting refugee protection.

[20] The onus was on the Applicant to provide sufficient evidence of risk in the Bahamas. The RAD noted that the Applicant explained that she had a "feeling" that the wife of her ex-partner would still be interested in her; however, this was not sufficient to qualify as evidence of persecution.

[21] The RAD's conclusion that the Applicant would not face persecution was not based solely on the passage of time, but also based upon the absence of any evidence that the agent of persecution had any ongoing interest in seeking out the Applicant.

[22] Although the Applicant accuses the RAD of speculating on this point, it is the Applicant who has the burden of proof and, in the absence of evidence, it is the Applicant who is speculating about any ongoing threats she might face from the agent of persecution (*Liang v Canada (Citizenship and Immigration)*, 2020 FC 116 at para 41).

C. *Did the RAD fail to consider compelling reasons under subsection 108(4) of IRPA?*

[23] The Applicant argues that the RAD failed to consider if her case fell into the compelling reasons exception under subsection 108(4) of IRPA. She argues that this applies to her case as

the medical evidence confirms that she will re-experience trauma if she is returned to the Bahamas.

[24] Subsection 108(4) of IRPA states:

Paragraph (1)(e) does not apply to a person who establishes that there are compelling reasons arising out of previous persecution, torture, treatment or punishment for refusing to avail themselves of the protection of the country which they left, or outside of which they remained, due to such previous persecution, torture, treatment or punishment.	L'alinéa (1)e) ne s'applique pas si le demandeur prouve qu'il y a des raisons impérieuses, tenant à des persécutions, à la torture ou à des traitements ou peines antérieurs, de refuser de se réclamer de la protection du pays qu'il a quitté ou hors duquel il est demeuré.

[25] I agree with the Respondent that it is not appropriate for the Applicant to raise this issue for the first time on judicial review when it was not an issue raised before the RAD.

[26] In any event, the section 108 provisions of the IRPA, regarding cessation of refugee protection, do not apply to the Applicant's circumstances. In order for subsection 108(4) to be applicable, there would need to be a finding that the Applicant has suffered a form of persecution as contemplated by sections 96 or 97 of IRPA or there would need to be *prima facie* evidence of past persecution that is so exceptional in its severity that it rises to the level of appalling or atrocious (*Idarraga Cardenas v Canada (Citizenship and Immigration)*, 2010 FC 537 at paras 37-38 [*Idarraga*]; *Kostrzewa v Canada (Citizenship and Immigration)*, 2012 FC 1449 at para 30 [*Kostrzewa*]),

[27] As the Applicant has not been found to be a refugee, this provision would not apply to her circumstances. This provision is triggered after evidence has been established of previous persecution and the subsequent change in country conditions (*Niyonzima v Canada (Citizenship and Immigration)*, 2012 FC 299 at para 56; *Idarraga* at paras 37-38; *Kostrzewa* at para 30). There is no such evidence in this case.

IV. Conclusion

[28] This Application for judicial review is dismissed.

[29] There is no question for certification.

JUDGMENT IN IMM-12554-22

THIS COURT'S JUDGMENT is that:

1. This Application for judicial review is dismissed

2. There is no question for certification

"Ann Marie McDonald"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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