Federal Court  Cour fédérale

Date: 20150127

Docket:IMM-3469-13

Citation: 2015 FC 105

Toronto, Ontario, January 27, 2015

PRESENT: The Honourable Mr. Justice Brown

BETWEEN:

ZAKIA GULAMSAKHI

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

[1] This is an application for judicial review by Zakia Gulamsakhi [the Applicant] under subsection 72(1) of the Immigration and Refugee Protection Act, SC 2001, c 27 [IRPA] of a decision by the Immigration and Refugee Board, Refugee Protection Division [RPD], dated April 3, 2013, wherein the RPD determined that the Applicant was not a Convention refugee or a person in need of protection.

[2] This application should be allowed for the following reasons.

I. FACTS

[3] The Applicant was born on April 14, 1971 in Afghanistan. She is a citizen of Afghanistan, belongs to the Hazara ethnic group and is a practicing Shi'a Muslim. The Applicant entered Canada on October 25, 2011 and applied for refugee protection on the basis of her fear of domestic abuse at the hand of her husband. She made the following allegations in support of her claim:

1. The Applicant and her family, as members of both an ethnic and religious minority, have continuously suffered from discrimination, stigmatization, and risk of harm in Afghanistan, most particularly after the Taliban came to power in 1996.

2. The Applicant was married in 1997 to a Shi'a man who was wealthy and well-known in the community. After their marriage, the Applicant's husband became verbally, emotionally, physically, and sexually abusive toward her. She became aware that he was involved in drug trafficking and associated with armed militias. He was also an alcoholic, which worsened his violent tendencies. The Applicant described her husband as a "predatory pedophile" who brought home young boys and girls. After she found out about these occurrences, he became more violent toward her and threatened to kill her if she told anyone about the incidents. She was constantly afraid of her husband.

3. The Applicant's husband was controlling of her behaviour, not allowing her to leave the house or to visit her family. Due to this lack of contact, the Applicant's family was largely unaware of her husband's abusive behaviour. In 2011, approximately 14 years after her marriage, the Applicant was allowed a brief visit with her family and convinced her mother and brother to help her. They first tried to speak to her husband about the situation, but when that failed, her brother agreed to file for a divorce. The Applicant's husband used his personal influence to stop the divorce proceedings and threatened her family. He put a gun to the Applicant's head and threatened to shoot her if she ever "conspired against him" again. After this incident, she was subjected to further physical and sexual assault and locked inside the home. The Applicant became depressed and had suicidal thoughts.

4. While she was being held captive, the Applicant's brother obtained a Tazkira (dated August 27, 2011) for her from Afghan authorities. A Tazkira is the primary identity document used in Afghanistan, a country which has no national identity card. A Tazkira is needed to obtain an Afghan passport. The brother used the Applicant's Tazkira to obtain an Afghan passport for the Applicant and then helped her escape from her husband's home. She immediately travelled to Uzbekistan with a friend of her brother. After the Applicant left, her husband sent armed militiamen to her parent's home and they were severely beaten and her brother was kidnapped. Her brother has not been heard from since. The Applicant's husband falsely reported her to Afghan authorities for running away

with another man. The Applicant claims that if she returns to Afghanistan, her husband will kill her for dishonouring him and that she may be arrested and imprisoned for adultery.

5. In Uzbekistan the Applicant gave her Afghan passport to her brother's trusted friend, who used it to obtain a Pakistani passport for her. She used this document to travel to Canada because one cannot enter Canada on an Afghan passport without a Canadian visa which she did not have. She left Uzbekistan on October 24, 2011 and arrived in Canada the following day. The Applicant claimed refugee protection on November 2, 2011.

[4] The RPD heard the Applicant's case on April 2, 2013 and rejected the Applicant's refugee protection claim on April 3, 2013. This Court granted leave to apply for judicial review on July 2, 2014.

II. Analysis

Identity and Credibility

[5] Before the RPD the claimant's identity and credibility were the determinative issues. These issues continued in this application for judicial review, in which an additional matter was raised, namely the RPD's failure to allow an adjournment. I will deal with the issues of identity and credibility first. It is settled law that findings of identity and credibility and the RPD's assessment of the evidence are questions of fact that are reviewable on a reasonableness

standard: Liu v Canada (Minister of Citizenship and Immigration), 2012 FC 277 at para 8; Matingou-Testie v Canada (Minister of Citizenship and Immigration), 2012 FC 389.

[6] The RPD noted that the Applicant testified in the Dari language, a native language to Afghanistan, but that speaking the language did not establish personal identity or nationality. That said, the RPD accepted the Applicant's nationality as a citizen of Afghanistan, but found that she had failed to establish her personal identity due to the lack of credible documentation regarding the Tazkira.

[7] The RPD acknowledged the Tazkira submitted by the Applicant, but expressed several concerns related to the document and ultimately gave this critical document little or no weight, leading it to reject the Applicant's claim. The RPD's findings are set out below, and my comments follow each:

1. The RPD did not accept the Applicant's testimony that a Tazkira could be obtained by another person on her behalf, stating that this did not conform with the documentary evidence;

Court comment: In this, the PRD relied on the documentary evidence. However, the documentary evidence, which was supplied by the Immigration and Refugee Board of Canada itself in Responses to Information Requests [RIR], and filed with the RPD is inconsistent and contradictory. It states, variously, that all Afghanis need a Tazkira to go to school, work or obtain a passport, but that however, Tazkiras are often only applied for

when they are needed, and that while men must have a Tazkira, having one is only "optional" (to use the words of the RIR) for women. The RIR suggests that Tazkiras are obtained differently by those within or outside Afghanistan, whereas in fact the material filed makes it clear they cannot be applied for from outside of Afghanistan. In this connection all that can be gleaned with certainty from the RIRs on record is that:

a) a Tazkira is required to obtain a passport. This in fact is why and exactly what occurred on the facts of this case, and

b) the application must be made by a male person. Again, this is exactly what happened on the facts of this case. The Applicant's brother applied for the Tazkira as her closest male relative given her father had passed away.

In these circumstances, the RPD's finding is contrary to the evidence and therefore unreasonable

2. The Tazkira had no legible signatures or legible wet stamps to show that it was issued by the proper government authorities.

Court comment: The Tazkira in the record is a photocopy of the original. The original was taken by and presumably remains in the possession of employees or agents of the Respondent or those of Canada Border Services Agency [CBSA]. The original was never examined by the RPD. In fact, one wet stamp is certainly visible, but weakly, on the

photocopy made and supplied by the Respondent/CBSA to the RPD and the parties. I am not prepared to blame this Applicant nor see her claim rejected for what may be a weak photocopy of an original on file with the Government of Canada.

The documentary evidence in terms of multiple wet stamps is as uncertain and inconsistent as the RIR material on how Tazkiras are obtained in the first place, as noted above. There appears to be only one wet stamp. But the documentary evidence was not that they always had two stamps, only that they "usually" had two stamps. The RIR also reported that there is "some variance" and also that there are "inconsistencies" on Tazkira certificates. I certainly agree that the signatures are not legible but in my experience, and I take judicial notice of the fact that many if not most signatures on Canadian official documents are not legible, witness the signature on the decision in question. I find the RPD's expectation of or demand for legible signatures on official Afghani documents to be very unreasonable. If it were otherwise, such a finding likely could be drawn at anytime in any refugee case from any country, with the result that virtually any claimant could be denied refugee status whether merited or not.

3. Documentary evidence indicated that Tazkira can be procured through corrupt government officials for a price.

Court comment: This is a correct conclusion on the record. However, in the absence of a valid basis to suspect otherwise, this finding is irrelevant in this proceeding. There is a presumption of authenticity that applies to a document issued by a government authority

that appears genuine on its face, unless there is a valid reason to doubt its authenticity: *Ramalingam v Canada (Minister of Citizenship and Immigration)* (1998), 77 ACWS (3d) 156 (FC). In the absence of legitimate concerns, this presumption must be given its legal effect. The RPD's conclusion is not linked to the facts, is contrary to law and therefore is unreasonable.

4. The RPD did not accept the Applicant's testimony that she did not know why she was not issued a Tazkira at birth, and that, though a Tazkira is necessary in Afghanistan for one to apply for job, attend school or university, or apply for a passport, she had only obtained this document two months before leaving Afghanistan and she did not know why she had not been issued a Tazkira previously or how she had attended school without one.

Court comment: This line of reasoning is unreasonable. Issuance or not of a Tazkira is not something that would be known by a child – the Applicant was 6 years old when she started school in Afghanistan. How exactly she would know why she was not issued one at birth is not stated by the RPD. The evidence of the RIR is that Tazkiras are applied for and attested to by Afghani males, usually the father, but in this case, the Applicant's father is dead. I find this discussion unreasonable, premised as it is on assumptions and expectations that are unrealistic for the Applicant to achieve. The RPD is entitled to find as a fact that the Applicant did not know why she was not given a Tazkira at birth and why she did not have one decades previously when she was at school. However, in my

view neither finding may be employed to discredit the document or affect the Applicant's credibility in the circumstances of this case.

[8] In addition, the RPD took issue with the Applicant's testimony that she had only obtained a Tazkira two months before her departure because she needed it to apply for an Afghan passport and that she no longer possessed the Afghan passport because her brother and his friend used it to obtain a Pakistani passport for her. The RPD found that it was "not credible or logical" for someone to use a genuine passport to exit her country of origin to a third country, but then use a fraudulent passport to exit the third country and travel to Canada. The RPD rejected this explanation and drew a negative credibility inference. However, on analysis, what the Applicant did was entirely logical. She needed an Afghani passport to leave Afghanistan, but could not use one to enter Canada because to enter Canada on an Afghani passport she would have needed a Canadian visa which she did not have. She gave the Afghani passport to the smugglers having no further use for it in her escape from her husband. Also, she was completely in the hands of the smugglers at that time. With the forged Pakistani document the smugglers provided, she entered Canada on a passport which did not require a visa. The RPD erred in concluding these actions were not logical, which finding is against the evidence.

[9] Moreover, this Court has repeatedly cautioned against drawing negative conclusions based on the use of smugglers and forged documents to escape violence and persecution. Travelling on false documents or destroying travel documents is of very limited value as a determination of the claimant's credibility: Attakora v Canada (Minister of Employment and Immigration) (1989), 99 NR 168 (FCA) [Attakora]. This is partly because it is not uncommon

for a person fleeing persecution to follow the instructions of the person(s) organizing their escape: Rasheed v Canada (Minister of Citizenship and Immigration), 2004 FC 587 at para 18, citing Attakora. This is consistent with the Applicant's evidence regarding the fate of her Afghan passport as outlined above.

[10] In addition, the RPD found fault with other further aspects of the Applicant's case. First, it did not accept the Applicant's testimony regarding her marriage certificate. At the hearing, the RPD asked the Applicant where the marriage certificate was and if she had attempted to get a copy of it. She testified that it was at her husband's home and that she had not attempted to get a copy. The Applicant testified that she had not gone to the Afghani Consulate in Canada to obtain a copy of either her marriage certificate. The RPD said it would not pursue this issue, but earlier drew a negative inference for not obtaining "primary identity documentation" . The RPD acted unreasonable if by this it expected the Applicant to ask her husband for the marriage certificate. It would be equally unreasonable to expect this husband to send it to her. And as noted above, the RIR evidence was that for the Applicant to obtain a replacement Tazkira she would have to return to Afghanistan.

[11] The RPD mistakenly drew a negative credibility inference because, when asked for the date of her marriage, the Applicant initially testified that she was married in 1997 and when asked for a more specific date, the interpreter said she said "it was November, December". The RPD complained that the Applicant later testified, after an interjection from her counsel, that she was married in March 1997 and noted that she did not go on to give more details about her marriage ceremony. A review of the transcript shows that the RPD erred in stating that the

Applicant was confused about the date of her marriage – a finding of fact it made against the Applicant. However, and in fact, the Applicant stated she was married in 1997 in "Hoot". Hoot is March, which is exactly when she was married. The RPD misconstrued the evidence in this respect as a result of the interpreter's original incorrect translation which was corrected after a proper and useful discussion with Counsel at the hearing. The correct finding was ignored by the RPD. This finding was unreasonable.

[12] The RPD also took issue with the Applicant's testimony that she had not attempted to obtain any other primary identity documentation while she was in Canada. The RPD did not find the Applicant's explanations to be reasonable given that she was in contact with her mother in Afghanistan. The RPD further held that the Applicant had not met her obligations to document her identity and to explain what reasonable steps were undertaken to obtain reasonably available documentations as required by Rule 11 of the Refugee Protection Division Rules, SOR/2012-256 [RPD Rules] and jurisprudence by this Court. Some aspects of this concern are reasonable, but it is not at all certain the mother's affidavit would have made a difference to the RPD. I have already dealt with this comment in relation to a marriage certificate and Tazkira.

[13] I have taken pains to set out the credibility findings made by the RPD because of the grave consequences of its findings in this case. The RPD accepted that the Applicant is a citizen of Afghanistan but in effect rejected the only documentary proof, namely her Tazkira. But the RPD's unreasonable rejection of the Tazkira sentences the Applicant to deportation straight into the hands of her physically violent, powerful, and abusive husband. This would take place without any analysis of the grave risks faced by this Applicant.

[14] I have outlined the RPD's findings individually, and now, taking the reasons as a whole, I am driven to conclude that the rejection of the Tazkira, taken as a whole, was an unreasonable conclusion and must be set aside.

Refusal to grant adjournment

[15] The RPD's decision must also be set aside because of its failure to grant an adjournment. At the hearing, the Applicant requested an adjournment to allow her to provide additional documentary evidence on the critical issue of identity. After discussion with Counsel, the RPD refused this request and issued its decision the following day, rejecting the Applicant's claim for refugee status. The Applicant did not have the benefit of any form of risk assessment under either Sections 96 or 97.

[16] The RPD's refusal to grant an adjournment to allow the Applicant to obtain further identity documentation is a question of procedural fairness. The jurisprudence on the applicable standard of review is mixed. Normally, questions of procedural fairness are reviewed with no deference: *Canada (Minister of Citizenship and Immigration) v Khosa*, 2009 SCC 12 at paras 45-56; *Dunsmuir* at para 60. This Court has thus applied correctness to review whether the Board's refusal to postpone or adjourn breached natural justice: *Bafkar v Canada (Public Safety and Emergency Preparedness)*, 2012 FC 934 at para 27; *Javadi v Canada (Minister of Citizenship and Immigration)*, 2012 FC 278 at para 18; *Julien v Canada (Minister of Citizenship and Immigration)*, 2010 FC 351 at para 23).

[17] However, because the RPD's decision not to adjourn the Applicant's refugee claim is a discretionary one, this Court has on other occasions held that reasonableness is the appropriate standard in assessing whether the RPD properly assessed the factors in determining whether to grant a postponement: *Galamb v Canada (Minister of Citizenship and Immigration)*, 2014 FC 563 at paras 17-18; *Stephens v Canada (Minister of Citizenship and Immigration)*, 2013 FC 609 at para 31 [*Stephens*]; *Philistin v Canada (Public Safety and Emergency Preparedness)*, 2011 FC 1333 at para 8 [*Philistin*]; *Omeyaka v Canada (Public Safety and Emergency Preparedness)*, 2011 FC 78 at para 13 [*Omeyaka*].

[18] Even where this Court has found the standard of review is reasonableness, it has commented to the effect that it should only intervene where the Applicant can show the refusal to postpone or adjourn resulted in a breach of procedural fairness: *Stephens* at para 31.

[19] In my view, the appropriate standard of review is correctness, as described below. This Court in *Stephens*, *Philistin*, and *Omeyaka*, in holding that reasonableness applies, relied on the Federal Court of Appeal case of *Wagg v Canada*, 2003 FCA 303. While Justice Pelletier in *Wagg* does state that "the decision as to whether to grant an adjournment is a discretionary decision", he follows that by saying that it "must be made fairly" (at para 19). Therefore, *Wagg* does not stand for the proposition that a tribunal's decision on postponement is reviewed on the reasonableness standard.

[20] Further, I do not agree that the RPD's application of a discretionary power that results in procedural unfairness can be said to be reasonable.

[21] Thus, my view is that the appropriate standard of review here is correctness, but that in determining whether the RPD breached procedural fairness, the Court should bear in mind that the decision to grant a postponement or adjournment is a discretionary one. In *Dunsmuir* at para 50, the Supreme Court of Canada explained what is required of a court reviewing on the correctness standard of review:

> When applying the correctness standard, a reviewing court will not show deference to the decision maker's reasoning process; it will rather undertake its own analysis of the question. The analysis will bring the court to decide whether it agrees with the determination of the decision maker; if not, the court will substitute its own view and provide the correct answer. From the outset, the court must ask whether the tribunal's decision was correct.

[22] At the hearing before the RPD, it was the Applicant's position that the Tazkira was the primary document obtainable by her in Afghanistan. Given its concerns with the genuineness of the Tazkira, the RPD requested corroborating evidence:

> COUNSEL: If the panel is of the opinion that it is a fraudulent document, then perhaps the panel should raise questions and put on the table its concerns as to why this Tazkira, in the panel's opinion, is fraudulent. Because the claimant has sworn that she has presented documents that are not fraudulent and that her testimony would be truthful. And if there is any doubt in the panel's mind, then the panel is under an obligation to put forth the reasons for not believing the Tazkira to be an authentic document – or to believe or conclude that the document is a fraudulent document.
>
> MEMBER: I just like to see something else with it. That's all.
>
> [Emphasis added.]

[23] The Applicant's counsel requested an adjournment or permission to submit documents post-hearing. Both requests were rejected on the basis that the Applicant had ample time to gather documents in support of her identity.

[24] It was the Applicant's position that a Tazkira was, in fact, the only primary document issued by Afghanistan in support of someone's identity. The RPD agreed. It was the only real issue in the entire case as it developed and was concluded, notably without any risk assessment.

[25] In my opinion, in the circumstances of this case, the RPD erred in refusing to grant the Applicant an adjournment or permission to file evidence later. All adjournments require a balancing of the many circumstances of the case. Here, the primary error was that the RPD did not factor into its balancing the consequences of deportation for this Applicant. It is very obvious from the transcript that the RPD's request for other identification documents came as a surprise to the Applicant. At no time during the hearing did the RPD identify the concerns it had regarding the Tazkira which it later enunciated in its reasons – despite repeated requests by counsel, which although not mandatory is a relevant factor in the circumstances of this case. In the present case, particularly given the potentially horrific fate awaiting the Applicant, not only at the hands of her husband but also at the hands of criminal and possibly religious justice authorities, and given little prejudice an adjournment would realistically cause the RPD or Canadian authorities, in my view in the circumstances overall fairness required the RPD to grant the adjournment to enable the Applicant to provide the RPD with the corroborating documents it was requested. On this basis as well, the decision must be set aside.

[26] No question was proposed for certification by either party, and I find there is none.

JUDGMENT

THIS COURT'S JUDGMENT is that the application for judicial review is granted, the decision of the RPD is set aside, the matter is remitted to be determined by a differently constituted panel of the RPD, no question is certified, and there is no order as to costs.

"Henry S. Brown"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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