Federal Court  Cour fédérale

Date: 20150417

Docket: IMM-5986-13

Citation: 2015 FC 491

Toronto, Ontario, April 17, 2015

PRESENT: The Honourable Mr. Justice Diner

Docket: IMM-5986-13

BETWEEN:

ABIEYUWA V. BRODRICK

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Overview

[1] The Applicant is a 36 year old woman from Nigeria who is seeking to escape domestic abuse at the hands of her husband. The Refugee Protection Division [RPD] rejected her claims as a refugee and a person in need of protection under section 96 and 97 of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [*IRPA*], on the basis that she had an internal flight

alternative [IFA] within the country. The Refugee Appeal Division [RAD] upheld the RPD's decision in accordance with section 111(1)(a), which forms the basis of this judicial review.

II. Facts

[2] Ms. Brodrick operated a small business in Nigeria, buying and selling menswear. In January 2010, she first met her future husband. A wealthy man, he spent lavishly on Ms. Brodrick and in March 2011, the two married. Six months into the relationship, the Applicant's mother-in-law moved in with the couple at their Benin City home and their newly formed matrimony began to sour.

[3] The Applicant's mother-in-law was abusive, constantly checking to see if she was pregnant and verbally harassing her. The Applicant became pregnant twice in 2011, but miscarried, for which her mother-in-law blamed her. It was around this time that Ms. Brodrick's husband began to beat and sexually assault her. When she attempted to flee to her father's house, roughly an hour and a half from her home, her father brought her back, as he did not believe in divorce. The Applicant also attempted to stay with a friend in April 2012, but her husband tracked her down and harassed her friend until she left with him.

[4] In August 2012, while the Applicant was pregnant, she was violently assaulted by her husband and mother-in-law and lost the child as a result of her injuries. Her husband refused to take her to the hospital.

[5] Ms. Brodrick was assaulted again in November 2012, after her husband accused her of having an affair. She was knocked unconscious by him, and later went to the police station to report the incident with the support of her neighbour. The police declined to investigate the matter, saying that in domestic relationships it "was war today but peace tomorrow." It was at this point that the Applicant fled the country, with the assistance of a smuggling agent. The Applicant arrived in Canada on January 19, 2013, where she made a claim for protection.

III. The Decisions

[6] On April 19, 2013, the RPD rejected Ms. Brodrick's claim for refugee protection. The determinative issue was her IFA in the city of Abuja, Nigeria's capital. The RPD relied on a United Kingdom Home Office Country of Origin Information Report [UK Report] which states that the "sheer size of the country and its large population means that it would be very difficult for a husband, or other family members, to locate a woman who has escaped FGM [female genital mutilation], a forced marriage or is a victim of domestic violence."

[7] The RPD also concluded that there was no persuasive evidence that the Applicant's husband or his family had searched outside Benin City for her, or that he had the capacity to locate her in Abuja. The RPD further noted the existence of a women's shelter, and other governmental resources, such as counselling services, which could provide assistance to the Applicant in Abuja.

[8] The RPD determined that it would not be unreasonable to expect the Applicant to relocate, because the Federal Capital Territory wherein Abuja is located is composed of roughly

equal populations of Christians and Muslims, so her religious identity as a Christian would not endanger her safety. Further, the Board concluded that her previous experience as a small business owner would enable her to sustain a livelihood upon relocation.

[9] The RAD reviewed the RPD's decision on August 19, 2013 on a standard of reasonableness. It noted that the RPD had no credibility concerns with Ms. Brodrick (Application Record [AR], p 20).

[10] In its interpretation of sections 110(1), 110(2) and 111(1) of *IRPA*, the RAD acknowledged that the standard of review for its review of the RPD's decision had not been specified in the legislation, and primarily relied on *Newton v Criminal Trial Lawyers' Association*, 2010 ABCA 399 [*Newton*], for guidance as to the factors which should be considered by an appellate tribunal in deciding the standard of review for a tribunal at first instance. These factors, as laid out by Justice Slatter in paragraph 43 of *Newton*, include:

> (a) the respective roles of the tribunal of first instance and the appellate tribunal, as determined by interpreting the enabling legislation;
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> (b) the nature of the question in issue;
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> (c) the interpretation of the statute as a whole;
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> (d) the expertise and advantageous position of the tribunal of first instance, compared to that of the appellate tribunal;
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> (e) the need to limit the number, length and cost of appeals;
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> (f) preserving the economy and integrity of the proceedings in the tribunal of first instance; and
>
> (g) other factors that are relevant in the particular context.

[11] After reviewing each of the *Newton* factors, the RAD found that:

> "In accordance with this deference, findings of facts and findings of mixed law and fact are to be assessed on the basis of reasonableness. Both the RPD and RAD are considered to have specialized knowledge. Therefore, errors of law within the expertise or mandate of the tribunals as well as questions of law of more general interest to the legal system are to be reviewed for correctness."
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> (AR, p 19-20)

[12] The RAD summarized the RPD's analysis of the documentary evidence regarding Ms. Brodrick's IFA, including its reference to the UK Report noted above, as well as other evidence pointing to the operation of domestic violence shelters and services in Abuja. The Applicant submits at this Court that the documentary evidence indicates that these shelters are no longer operational, and there is no evidence that other shelters have opened in their stead (AR, p 101).

[13] The RAD concluded that:

> Deference is owed to the RPD in considering whether the decision is reasonable. I find that even though the RPD did not specifically refer to the matters outlined by the appellant, the RPD's decision is supported by the evidence and the issues raised by that portion of the documentation were sufficiently canvassed through the oral testimony and addressed in the reasons.
>
> (AR, p 21)

[14] It is unclear from the reasons as to how thoroughly the RAD reviewed the documentary evidence the RPD relied on for its IFA analysis, as the RAD's reasons largely summarized the RPD's reasons, as opposed to quoting from the documentary evidence itself or conducting its own analysis.

IV. Analysis

[15] Before engaging in the merits of this judicial review, this Court must address the RAD's selection of the standard of review on which it chose to review the RPD's decision. Firstly, this Court must decide whether the selection of the standard by the RAD should be reviewed deferentially. In other words, is the Court ultimately responsible for selecting the standard (deciding whether it is one of correctness or reasonableness) or is it the RAD's prerogative to select its own standard (which in this case was reasonableness), as long as that selection falls within a range of reasonable options?

[16] Having decided whether to review the RAD's selection of its standard of review on the basis of correctness or reasonableness, if the Court chooses the latter, it must assess whether the RAD's approach falls within a range of reasonable options. A reasonable decision is an acceptable and rational solution that is justifiable, transparent and intelligible (*Dunsmuir v New Brunswick*, 2008 SCC 9 at para 47).

[17] In summary, the RAD's selection of its standard of review produces two basic questions:

1) What is the standard of review this Court should use in reviewing the RAD's selection of the standard of review that the RAD uses to assess the RPD's decision?
2) If the answer to the above is reasonableness, was RAD's decision to assess questions of mixed fact and law in the RPD's decision on a basis of reasonableness within the range of reasonable options available to it?

[18] Both of these questions have produced varying answers in the Federal Court, resulting in several certified questions to the Federal Court of Appeal (*Huruglica v Canada (Citizenship and Immigration)*, 2014 FC 799 [*Huruglica*]; *Triastcin v Canada (Citizenship and Immigration)*, 2014 FC 975; *Spasoja v Canada (Citizenship and Immigration*) 2014 FC 913 [*Spasoja*]; *Yetna v Canada (Citizenship and Immigration)*, 2014 FC 858 [*Yetna*]; *Akuffo v Canada (Citizenship and Immigration)*, 2014 FC 1063 [*Akuffo*]; *Nnah* v *Canada (Citizenship and Immigration)*, 2015 FC 77). Higher Courts will ultimately provide a binding resolution to the RAD's institutional position on the standard of review, but in the mean time, I am bound to provide a ruling on the matter at hand, and to do so, rule on the questions raised in this judicial review.

[19] It is my conclusion that in answer to the first question, a review of the RAD's decision should be undertaken by this Court on the standard of reasonableness. On the second question, I find that, given the RAD's purpose in the scheme of the *IRPA*, its decision to review the RPD's findings of mixed fact and law on the basis of reasonableness was an unreasonable one. I shall address the basis for these conclusions in turn.

A. *This Court's Standard of Review of RAD Decisions*

[20] In my view, this Court should review the RAD's selection of its standard of review for reasonableness.

[21] In *Huruglica*, Justice Phelan held that the Court's review should be conducted on a standard of correctness, as the question is of general importance to the legal system that is "well

beyond the scope of the RAD's expertise, even though it depends on the interpretation of the *IRPA*, the RAD's home statute" (*Huruglica* at paras 26, 30). Other judges of this Court have found this reasoning persuasive (*Yetna* at paras 14-15; *Bahta v Canada (Citizenship and Immigration)*, 2014 FC 1245 at para 10 [*Bahta*]), including Justice Roy, who added that such a question may also be described as a jurisdictional one between two specialized tribunals, which further favours correctness review (*Spasoja* at para 8).

[22] Justice Gagne diverted from the *Huruglica* approach in *Akuffo*, wherein she stated:

> [20] In other words, in order for this Court to apply a correctness standard to an administrative tribunal's interpretation of its own statute, each criterion must be met: i) the question of law has to be of central importance to the legal system as a whole; and ii) the question of law has to fall outside the adjudicator's expertise. Even if I agreed with Justice Phelan that "the determination of the RAD's standard of intervention for an appeal of the RPD decision is outside its expertise and experience", the first part of the test still must be met in order for the correctness standard to apply.

[23] This countervailing approach, which I prefer, is to review the RAD's decision for reasonableness. The rationale and jurisprudence supporting this deferential stance has been clarified by my colleagues (*Akuffo* at paras 18-26; *Djossou v Canada (Citizenship and Immigration)*, 2014 FC 1080 at paras 18-29), so I need only canvass it briefly here.

[24] I have my doubts as to whether the RAD's selection of its standard falls within one of the four categories of questions for which the correctness standard continues to apply, namely (i) constitutional questions, (ii) questions of law that are of central importance to the legal system as a whole and that are outside the adjudicator's expertise, (iii) questions regarding the

jurisdictional lines between two or more competing specialized tribunals, and (iv) true questions of jurisdiction or *vires* (*Alberta (Information and Privacy Commissioner) v Alberta Teachers' Association*, 2011 SCC 61 at para 30 [*Alberta Teachers*]).

[25] Indeed, in *Canada (Canadian Human Rights Commission) v Canada (Attorney General)*, 2011 SCC 53 [*Human Rights Commission*], a unanimous Supreme Court upheld the Canadian Human Rights Tribunal's conclusion that it had the authority to award costs, despite the lack of any explicit language in its enabling statute allowing it to do so. The Respondent argued that the Tribunal had no particular specialized expertise in costs, to which the Justices Lebel and Cromwell responded:

> [25] Although the respondent submitted that a human rights tribunal has no particular expertise in costs, **care should be taken not to return to the formalism of the earlier decisions that attributed "a jurisdiction-limiting label, such as 'statutory interpretation' or 'human rights', to what is in reality a function assigned and properly exercised under the enabling legislation" by a tribunal** … The inquiry of what costs were incurred by the complainant as a result of a discriminatory practice is inextricably intertwined with the Tribunal's mandate and expertise to make factual findings relating to discrimination.… As an administrative body that makes such factual findings on a routine basis, the Tribunal is well positioned to consider questions relating to appropriate compensation under s. 53(2). In addition, a decision as to whether a particular tribunal will grant a particular type of compensation — in this case, legal costs — can hardly be said to be a question of central importance for the Canadian legal system and outside the specialized expertise of the adjudicator.…
>
> …..
>
> [27] In summary, the issue of **whether legal costs may be included in the Tribunal's compensation order is neither a question of jurisdiction, nor a question of law of central importance to the legal system as a whole and outside the Tribunal's area of expertise within the meaning of Dunsmuir.** As such, the Tribunal's decision to award legal costs to the

> successful complainant is reviewable on the standard of reasonableness.
>
> [Emphasis added]

[26] I find it difficult to distinguish why the Human Rights Tribunal's interpretation of its ambiguous home statute with regard to a remedy would be viewed on a standard of reasonableness, while the RAD's interpretation of its ambiguous home statute with regard the standard of review would be judged on a standard of correctness. To classify the selection of a standard of review as outside the expertise of the decision maker results in the very "jurisdiction-limiting" labelling the Supreme Court cautioned against in the passage cited above from *Human Rights Commission*. Furthermore, it runs contrary to the presumption of deference owed to a tribunal in the interpretation of its home statute (*Alberta Teachers* at para 34).

[27] Lastly, I note that while the Supreme Court of Canada recently reviewed a question of law from a Tribunal on a standard of correctness in *Tervita Corp v Canada (Commissioner of Competition*), 2015 SCC 3 [*Tervita*], the language of the enabling legislation in that case mandated such an approach because the Competition Tribunal's decision was to be reviewed as if it were a judgment of the Federal Court , per section 13(1) of the *Competition Tribunal Act*, RSC 1985, c 19 (2nd supp) (*Tervita* at paras 38-39). As a result, the presumption of reasonableness was rebutted (*Tervita* at para 35).

[28] No such language exists with regard to the RAD in *IRPA*. It should be noted, as an aside, that even considering the statutory language, Justice Abella in *Tervita* dissented on the majority's selection of correctness as the standard of review, concluding that "…notwithstanding legislative

wording — when a tribunal is interpreting its home statute, reasonableness applies" (*Tervita* at paras 170-171). In my view, this serves to underscore the significance placed on the presumption of reasonableness, and the high threshold required to rebut it.

[29] In light of the jurisprudence above, I am of the opinion that this Court should review the RAD's selection of its standard of review on the basis of reasonableness.

B. *The RAD's Standard of Review*

[30] In assessing whether the RAD's selection of its standard was reasonable, the Court must evaluate whether its conclusion falls within a range of acceptable and defensible options. This range is determined by the context informing it, and can vary from a broad range of options to a singular reasonable interpretation (*McLean v British Columbia (Securities Commission)*, 2013 SCC 67 at para 38; *Attaran v Canada (Attorney General)*, 2015 FCA 37 at para 48).

[31] There have been indications by the Federal Court that the RAD should be deferential in its analysis of an RPD decision, analyzing the lower decision for palpable and overriding errors in its factual findings (*Alvarez v Canada (Citizenship and Immigration)*, 2014 FC 702 at para 28; *Spasoja* at para 40).

[32] However, I am in agreement with several of my colleagues in finding that the RAD erred by reviewing the RPD on a standard of reasonableness (*Huruglica* at paras 54-55; *Yetna* at para 16; *Khachaturian v Canada (Citizenship and Immigration)*, 2015 FC 182 at para 30

[*Khachatourian]*; *Alyafi v Canada (Citizenship and Immigration)*, 2014 FC 952 at para 10; *Akuffo* at para 39).

[33] For the RAD to review the RPD on a basis of reasonableness is a reviewable error because the RAD is not a judicial body. To replicate a process of judicial review that this Court could then be required to undertake cannot have been Parliament's intention, as it would render the Federal Court's role duplicative (*Bahta* at para 11). Imposing a judicial framework, as Justice Phelan ruled in *Huruglica*, is not consistent with the administrative law principles animating the RAD's functions, nor is it compatible with the provisions of *IRPA*, particularly section 111(1)(b), which enables the RAD to substitute its own factual findings upon review (*Huruglica* at paras 44-47).

[34] In my view, the scheme of *IRPA*, the object of the Act and the intention of Parliament require the RAD to undergo more than a review for reasonableness when assessing the factual findings of the RPD (for instance, see the principle of statutory interpretation explained in *Imperial Oil v Jacques*, 2014 SCC 66 at para 47). This does not necessarily mean that the RAD must conduct its appeal *de novo*. Indeed, I find great merit to Justice Phelan's guidance in *Huruglica* as to how the RAD should conduct its appeal:

> [54] Having concluded that the RAD erred in reviewing the RPD's decision on the standard of reasonableness, I have further concluded that for the reasons above, the RAD is required to conduct a hybrid appeal. It must review all aspects of the RPD's decision and come to an independent assessment of whether the claimant is a Convention refugee or a person in need of protection. Where its assessment departs from that of the RPD, the RAD must substitute its own decision.

> [55] In conducting its assessment, it can recognize and respect the conclusion of the RPD on such issues as credibility and/or where the RPD enjoys a particular advantage in reaching such a conclusion but it is not restricted, as an appellate court is, to intervening on facts only where there is a "palpable and overriding error".

[35] Given that the reviewable error in the RAD's adoption of reasonableness as its standard of review is dispositive of this application (*Khachatourian* at para 39; *Diarra v Canada (Citizenship and Immigration)*, 2014 FC 1009 at para 29), I need not decide at this juncture whether the hybrid approach described by Justice Phelan above would be the only reasonable option available to it upon the proper interpretation of *IRPA*.

[36] Rather than reviewing the RPD's decision for reasonableness, the RAD in this case should have undertaken its own review of the documentary evidence. The RAD's assessment of this evidence could have impacted on its view on, among other things, whether there are adequate domestic violence shelter facilities in Abuja, as this supported the RPD's finding that the Applicant had an IFA in that city. In any event, even if the RAD had reviewed the documentary evidence, it provided no support for its conclusion that a domestic shelter in Abuja, which the Applicant argued had been shuttered, was not the shelter mentioned in the RPD decision.

[37] Therefore, I allow this application and remit the case to a newly constituted panel of the RAD for a reconsideration of the appeal.

[38] Since various questions regarding the RAD's standard of review have already been certified for disposition by the Federal Court of Appeal, a further question would not be of utility as this time.

JUDGMENT

THIS COURT'S JUDGMENT is that

1. The Application for judicial review is allowed.

2. No questions will be certified.

3. No costs will be awarded.

"Alan Diner"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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