

Federal Court



Cour fédérale

Date: 20150415

Docket: IMM-2626-14

Citation: 2015 FC 465

Toronto, Ontario, April 15, 2015

PRESENT: The Honourable Mr. Justice Fothergill

BETWEEN:

NINO PATARAIA

Applicant

and

**THE MINISTER OF CITIZENSHIP AND
IMMIGRATION**

Respondent

JUDGMENT AND REASONS

I. Introduction

[1] Nino Pataraia (the Applicant) has brought an application for judicial review pursuant to s 72(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 (the IRPA) of a decision of the Refugee Appeal Division of the Immigration and Refugee Board (the RAD) dated February 26, 2014. The RAD confirmed the decision of the Refugee Protection Division (the RPD) that

the Applicant is neither a Convention refugee within the meaning of s 96 of the IRPA, nor a person in need of protection as defined in s 97(1) of the IRPA.

[2] For the reasons that follow, the application for judicial review is dismissed.

II. Background

[3] The Applicant is a citizen of Georgia in the Caucasus Region of Eurasia. She alleges a fear of persecution resulting from domestic violence. Before the RPD, the Applicant alleged that she married in January, 2003 and shortly thereafter became the victim of physical and emotional abuse by her husband. The abuse escalated to the point that in 2005 the Applicant left her home in Tbilisi and moved in with her aunt. After a time she returned to live with her husband.

[4] The Applicant also said that her father-in-law had influence with the local authorities, and she believed that her husband had used this influence to have her brother arrested on false charges.

[5] According to the Applicant, in December, 2005 she received treatment at a hospital for a cut to her hand that was inflicted by her husband. She again moved in with her aunt and in June, 2006 she relocated to Batumi, approximately four hours by car from Tbilisi. The Applicant said that her husband found her in Batumi in June, 2010 and assaulted her in the street. Despite the presence of witnesses, the police refused to get involved. According to the Applicant, her husband continued to threaten her and her family, even after she moved to Italy in August, 2010.

She remained in Italy until July, 2013 when she returned briefly to Georgia before travelling to Canada and making a claim for protection.

[6] On November 7, 2013 the RPD rejected the Applicant's claim for protection on the ground that she lacked credibility. The RPD accepted that the Applicant had been the victim of domestic violence before December, 2005, but concluded that her allegations regarding events that took place after that period were not credible. The RPD found that the Applicant's behaviour after she first left her husband was inconsistent with someone facing ongoing abuse, and noted several inconsistencies in her testimony. The RPD also referred to a contradiction between the Applicant's statement at the port of entry (POE), what she included in her basis of claim form and her testimony before the RPD regarding where she had lived after leaving her husband. In addition, the RPD found that the Applicant should have sought protection at the first available opportunity, specifically while she resided in Italy.

[7] On appeal, the RAD reviewed the RPD's findings of credibility against a standard of reasonableness. Before the RAD, the Applicant argued that the RPD had made contradictory findings with respect to the credibility of her statement regarding her previous addresses at the POE, given that the RPD accepted that she had been abused before December, 2005. The RAD rejected the Applicant's argument, holding that it was reasonable for the RPD to draw a negative inference from the inconsistent evidence relating to her previous addresses. In addition, the RAD noted that the Applicant had not challenged any of the other adverse credibility findings, including her failure to seek protection in Italy, her re-availment of state protection in Georgia, and her decision to remain at her parents' home in Batumi for four years after leaving her

husband. The RAD noted that the RPD had based its decision on cumulative findings and negative inferences, and concluded that the RPD's decision was reasonable.

III. Issue

[8] The sole issue raised by the Applicant before this Court is whether the RAD committed a reviewable error by applying the reasonableness standard to the RPD's findings of credibility.

IV. Analysis

[9] In *Ngandu v Canada (Citizenship and Immigration)*, 2015 FC 423, I reviewed this Court's jurisprudence regarding the standard of review to be applied by the RAD in its consideration of credibility findings made by the RPD. I repeat the relevant portions of my analysis here.

[10] This Court has ruled repeatedly that the RAD commits an error when it applies the standard of reasonableness to its review of the RPD's factual findings (*Djossou v Canada (Citizenship and Immigration)*, 2014 FC 1080 [*Djossou*] at paras 6 and 7). Nevertheless, the RAD owes deference to an assessment of credibility by the RPD that is based on witness testimony (*R v NS*, 2012 SCC 72 at para 25).

[11] Most judges of this Court have held that, because the RAD is a specialized tribunal which conducts a "full fact-based appeal", it owes deference to the RPD only when a witness' credibility is critical or determinative or when the RPD enjoys a particular advantage (*Huruglica*

v Canada (Citizenship and Immigration), 2014 FC 799 [Huruglica] at paras 54-55; *Yetna v Canada (Citizenship and Immigration)*, 2014 FC 858 at para 17; *Akuffo v Canada (Citizenship and Immigration)*, 2014 FC 1063 [Akuffo] at para 39; *Bahta v Canada (Citizenship and Immigration)*, 2014 FC 1245 [Bahta] at para 16; *Sow v Canada (Citizenship and Immigration)*, 2015 FC 295 at para 13; see *contra Spasoja v Canada (Citizenship and Immigration)*, 2014 FC 913 at para 40 [Spasoja]).

[12] Although not unanimous on this point (see *Spasoja* at para 39), most judges of this Court have concluded that the RAD must conduct its own independent assessment of the evidence (*Iyamuremye v Canada (Citizenship and Immigration)*, 2014 FC 494 at para 41; *Huruglica* at para 47; *Njeukam v Canada (Citizenship and Immigration)*, 2014 FC 859 [Njeukam] at para 15; *Akuffo* at para 45; *Djossou* at para 53). The RAD's obligation to conduct an independent assessment of the evidence extends to questions of credibility.

[13] Some decisions of this Court have held that the RAD does not commit a reviewable error when it applies the standard of reasonableness to findings of pure credibility (*Njeukam*; *Akuffo*, *Allalou v Canada (Citizenship and Immigration)*, 2014 FC 1084; *Yin v Canada (Citizenship and Immigration)*, 2014 FC 1209 [Yin]). However, as explained by Justice Simon Noël in *Khachatourian v Canada (Citizenship and Immigration)*, 2015 FC 182 at para 32, this Court will uphold the RAD's application of the reasonableness standard to the RPD's findings of credibility only when it is clear that the RAD has in fact conducted its own assessment of the evidence.

[14] This is also the thrust of Justice Shore's decision in *Youkap v Canada (Citizenship and Immigration)*, 2015 FC 249 at paras 36 and 37, where he notes that in cases involving findings of pure credibility, the point is not which standard was applied but rather "whether the RAD conducted an independent assessment of the evidence as a whole." Justice Shore has also observed that "the idea that the RAD may substitute an impugned decision by a determination that should have been rendered without first assessing the evidence is inconsistent with the purpose of the IRPA" (*Triastcin v Canada (Citizenship and Immigration)*, 2014 FC 975 at para 25 [*Triastcin*]).

[15] In this case, the RPD's findings of credibility were wholly dependent on the Applicant's testimony, and the RPD therefore enjoyed a considerable advantage over the RAD in assessing credibility. In addition, it is clear that the RAD made an independent assessment of the evidence. This is demonstrated by its analysis of the Applicant's testimony and its conclusion that the inconsistency found by the RPD was not insignificant (see paras 30 and 31 of the RAD's decision).

[16] The Applicant did not challenge any other credibility findings of the RPD before the RAD. Even if the RAD had erred in its assessment of the single challenge to the RPD's credibility findings that was advanced on appeal, the RPD's remaining adverse findings of credibility would be sufficient for this Court to confirm the RAD's decision (*Siliya v Canada (Citizenship and Immigration)*, 2015 FC 120 at paras 24-25).

[17] Accordingly, the RAD's application of the reasonableness standard to its review of the RPD's credibility findings is not determinative of this application for judicial review. The RAD applied the standard of reasonableness to the RPD's findings of pure credibility, and also conducted its own assessment of the evidence. The RAD therefore committed no reviewable error in this case.

[18] The application for judicial review is dismissed.

V. Certified Question

[19] The Applicant asks that the following question be certified for appeal:

What is the scope of the review conducted by the Refugee Appeal Division when it considers an appeal of a decision of the Refugee Protection Division?

[20] In *Huruglica*, Justice Phelan certified the following question:

What is the scope of the Refugee Appeal Division's review when considering an appeal of a decision of the Refugee Protection Division?

[21] Similar questions have also been certified *inter alia* by Justice Locke in *Njeukam*, by Justice Roy in *Spasoja*, by Justice Shore in *Triastcin*, by Justice Gagné in *Akuffo*, and by Justice Zinn in *Nnah v Canada (Citizenship and Immigration)*, 2015 FC 77.

[22] The Respondent objects to the certification of the question in this case because it would not be dispositive of an appeal. This position finds support in some jurisprudence of this Court, for example *Bahta* at paras 19-20 and *Yin* at paras 41-42.

[23] I agree with the Respondent that the question should not be certified in this case.

Paragraph 74(d) of the IRPA provides that:

(d) an appeal to the Federal Court of Appeal may be made only if, in rendering judgment, the judge certifies that a serious question of general importance is involved and states the question.

d) le jugement consécutif au contrôle judiciaire n'est susceptible d'appel en Cour d'appel fédérale que si le juge certifie que l'affaire soulève une question grave de portée générale et énonce celle-ci.

[24] As Justice Martineau observed in *Alyafi v Canada (Citizenship and Immigration)*, 2014 FC 952 at para 57, certifying the same question in multiple cases does not facilitate timely interventions, which is one purpose of s 74(d) of the IRPA (*Varela v Canada (Citizenship and Immigration)*, 2009 FCA 145). An appeal of *Huruglica* has been commenced, and the question will therefore be fully canvassed in that case.

JUDGMENT

THIS COURT'S JUDGMENT is that the application for judicial review is dismissed.

No question is certified for appeal.

"Simon Fothergill"

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: IMM-2626-14

STYLE OF CAUSE: NINO PATARAIA v THE MINISTER OF CITIZENSHIP
AND IMMIGRATION

PLACE OF HEARING: TORONTO, ONTARIO

DATE OF HEARING: MARCH 25, 2015

JUDGMENT AND REASONS: FOTHERGILL J.

DATED: APRIL 15, 2015

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