Federal Court  Cour fédérale

Date: 20150709

Docket: IMM-4092-14

Citation: 2015 FC 842

Ottawa, Ontario, July 9, 2015

PRESENT: The Honourable Mr. Justice Southcott

BETWEEN:

E.F. AND G.H.,
BY HIS LITIGATION GUARDIAN E.F.

Applicants

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

[1] This is an application under ss. 72(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [Act] for judicial review of a decision of the Refugee Appeal Division of the Immigration and Refugee Board of Canada [RAD] dated April 25, 2014, wherein the RAD confirmed the decision of the Refugee Protection Division of the Immigration and Refugee Board of Canada [RPD] that the applicants are neither Convention refugees within the meaning of s. 96 of the Act nor persons in need of protection under s. 97 of the Act.

[2] For the following reasons, the application for judicial review is allowed and the matter is referred to the RAD for re-determination by a differently constituted panel.

I. **Preliminary Matter**

[3] At the hearing of this application, the applicants' counsel asked that the names of the applicants and the principal applicant's husband not appear in the Court's decision. As this request had not previously been raised, I asked for written submissions from the applicants, with the respondent to have an opportunity to consider the request and take a position and make submissions in response.

[4] In her subsequent written submissions, the applicants' counsel explains that there is no request for sealing of the Court file, only that the applicants' names be replaced with initials in the Court's decision. The applicants make this request, in the interests of safety and peace of mind, because of concern that the publication of their identities in the Court's decision could come to the attention of the principal applicant's husband, whom the principal applicant alleges sexually abused her and physically abused her and her son.

[5] The respondent opposes this request on the basis that, in order to grant a confidentiality order on the basis of alleged risk that the information at issue could create a serious threat to someone's personal safety, there must be evidence adduced in support which is not weak or speculative. The respondent argues that the presence of information already in the public domain will militate against the granting of such an order.

[6] The respondent refers to the decision of the Supreme Court of Canada in *Sierra Club of Canada v Canada (Minister of Finance)*, 2002 SCC 41 [*Sierra Club*] for the position that openness of Canadian courts is the rule and that court materials may only be treated as confidential when a party has established a real and substantial risk to an important interest (well-grounded in evidence) and established that the salutary effects of a sealing order outweigh its deleterious effects including the effects on public interest in open and accessible court proceedings.

[7] Finally, the respondent notes the applicants' delay in making this request, the fact that the existing file materials are already a matter of public record and the fact that the applicants base their request on a risk that has been rejected by the RPD and the RAD.

[8] Notwithstanding the points raised by the respondent, I am prepared to grant the applicants' request. I find that the application of the test prescribed by *Sierra Club* mandates the same result as it did in *A.B. v Canada (Citizenship and Immigration)*, 2009 FC 325, although I recognize that in that case the respondent took no position on the applicant's request. I consider the reduction of risk of violence to either of the applicants to represent a salutary effect which outweighs the minor reduction in the openness of this court proceeding, particularly as the applicants have taken the measured approach of seeking only to have the decision issued without their identities, without any other confidentiality to be imposed on this proceeding or the materials previously filed. See also *AC v Canada (Minister of Citizenship and Immigration)*, 2003 FC 1452, in which Justice Russell rejected the request for an order sealing the record in that case but replaced the applicants' names with initials in the style of cause, a result that he

described as an appropriate balance between the need for an open and accessible court and the need to avoid excessive promotion in the applicants' country of origin.

[9] In so ruling, I am conscious of the respondent's point that the evidence of risk faced by the applicants has been rejected by the RPD and RAD. However, as the outcome of this judicial review application is (for reasons explained below) to refer this matter back to the RAD for assessment of the credibility findings related to such risk, the Court considers it appropriate to rely on the applicants' evidence of past violence as sufficient to support their request. This is not intended to detract in any way from the role of the RAD in assessing this evidence upon its re-determination of this matter.

II. **Background**

[10] The principal applicant and her son, the minor applicant, are citizens of Kenya.

[11] On April 17, 2009, the principal applicant married her husband. She alleged that in December 2010 she started noticing abusive behaviour on the part of her husband, which worsened after she spoke to his family members for help. She alleges that she and her son were physically, emotionally and psychologically abused.

[12] In September 2012, the principal applicant sought help from the police in Kenya. She alleged the police were bribed to curtail the investigation.

[13] In September 2013, the applicants arrived in Canada and sought refugee protection.

[14] In a written decision dated November 15, 2013, the RPD rejected the applicants' refugee claim. It found that the principal applicant's oral testimony was inconsistent with her written evidence and that she was unable to explain numerous omissions, inconsistencies and contradictions within her evidence. The RPD concluded that the principal applicant had not established the central elements of her claim with credible or trustworthy evidence and, as the minor applicant's claim rested upon the evidence of his mother, it too was rejected.

[15] On appeal to the RAD, the applicants argued that the RPD relied on erroneous findings of fact in reaching its credibility finding. They also argued that the RPD unreasonably focused on irrelevant considerations, failed to consider the documents submitted by the applicants, and ignored documentary evidence which supported their claims. They asserted in particular that the RPD failed to consider and apply the Immigration and Refugee Board's Chairperson Guidelines 4: Women Refugee Claimants Fearing Gender-Related Persecution [Gender Guidelines]. Finally, the applicants submitted that the RPD had failed to consider their claims under s. 97 of the Act. The RAD noted that no new evidence was submitted by the applicants in the appeal.

[16] In a written decision dated April 25, 2014, the RAD dismissed the applicants' appeal and confirmed the RPD's decision. Following an analysis of the process to be employed to determine the standard of review applicable to its appellate function, the RAD concluded that it must show deference to the factual and credibility findings of the RPD. The RAD cited *Dunsmuir v New Brunswick*, 2008 SCC 9 as authority for applying a standard of reasonableness to issues of fact. It also concluded that the appropriate standard of review for questions of law raised in the appeal was one of correctness.

[17] The RAD found that the RPD's decision fell within a range of possible, acceptable outcomes, defensible in respect of the facts, and was therefore not unreasonable.

[18] In the present judicial review application, the applicants argue that the RAD erred in identifying the applicable principles and in applying them reasonably or correctly. They also argue that the RAD took into account erroneous and irrelevant considerations and failed to observe principles of natural justice, fundamental fairness or other procedures required by law. The applicants object to the RAD's credibility findings and, as before the RAD, argue failure to consider and apply the Gender Guidelines.

[19] The principal applicant has filed an affidavit in this application, providing an explanation for being confused at the hearing before the RPD. In her affidavit, the principal applicant explains that she was close to giving birth when the RPD hearing took place and that she had difficulty focusing due to resulting pain and anxiety. She states that she in fact gave birth two days later. Her affidavit also refers to being in possession of a letter from the police in Nairobi, confirming the authenticity of a police summons that the RPD had concluded was fraudulent.

[20] The respondent argues that these portions of the affidavit should be struck as they were not raised before the RAD.

III. **Issues**

[21] I would characterize the issues in this application as the following:

A. Should portions of the principal applicant's affidavit be struck?

B. What is the applicable standard of review?

C. Did the RAD adopt the proper standard of review in reviewing the RPD's decision?

D. Did the RAD err in its review of the RPD's decision?

IV. **Analysis**

A. *Should portions of the principal applicant's affidavit be struck?*

[22] It is well-established law that evidence which was not before a decision maker when its decision was rendered cannot be introduced upon judicial review of the decision (see *Zolotareva v Canada (Minister of Citizenship and Immigration)*, 2003 FC 1274 at para 36). This is not to say that evidence cannot in appropriate circumstances be raised to identify a process concern in support of an argument that an applicant has been deprived of procedural fairness (see *Association of Universities and Colleges of Canada v Canadian Copyright Licensing Agency (Access Copyright)*, 2012 FCA 22 at para 20). The Court recognizes that this is the sort of purpose for which the principal applicant wishes to introduce evidence of her condition at the time of her testimony before the RPD. The challenge for the applicants is that, based on the record before me, there is no indication that they introduced, or attempted to introduce, this evidence in the appeal before the RAD.

[23] Because the process point raised by the applicants relates to the principal applicant's testimony before the RPD, it was at the appeal before the RAD at which she should have sought to introduce this evidence. Section 110(4) of the Act prescribes the circumstances in which an appellant may introduce new evidence in an appeal to the RAD. I make no comment on the decision that the RAD might make in relation to such evidence. However, as I am allowing this application for other reasons detailed below, the applicants will have an opportunity to seek introduction of this evidence when this matter is being re-determined by the RAD.

[24] For present purposes, my decision in this application is rendered without reliance on the evidence in the principal applicant's affidavit as to her condition at the time of her testimony before the RPD. My decision is the same with respect to the reference in the principal applicant's affidavit to the letter from the police in Nairobi.

B. *What is the applicable standard of review?*

[25] The applicants rely upon a trilogy of decisions by Justice Shore in *Iyamuremye v Canada (Citizenship and Immigration)*, 2014 FC 494 [*Iyamuremye*], *Alvarez v Canada (Citizenship and Immigration)*, 2014 FC 702 [*Alvarez*], and *Eng v Canada (Citizenship and Immigration)*, 2014 FC 711 for the proposition that the RAD is obliged to conduct an independent assessment of the evidence in performing its appellate function.

[26] The respondent disagrees with this proposition, arguing that this Court's review of the RAD's selection of a standard of review should itself be conducted on a standard of reasonableness and that, in the case at hand, the RAD's decision to apply a standard of

reasonableness in its review of the RPD's decision was itself reasonable. The respondent further argues that, regardless of which standard of review is applied, the RAD conducted a fulsome analysis of all the evidence and found no disagreement with the RPD's determinations.

[27] As noted by Justice Fothergill in *Ngandu v Canada (Citizenship and Immigration)*, 2015 FC 423 [*Ngandu*], the law is not yet settled as to the standard of review to be applied by this Court to the RAD's determination of its own standard of review. Some decisions of this Court have applied the standard of correctness (see, for example, Justice Phelan's decision in *Huruglica v Canada (Citizenship and Immigration)*, 2014 FC 799 at paras 25-34 [*Huruglica*]). Other decisions have concluded that this Court should apply the standard of reasonableness when considering the RAD's determination of its own standard of review (see, for example, Justice Gagné's decision in *Akuffo v Canada (Citizenship and Immigration)*, 2014 FC 1063 at paras 17-26).

[28] However, as observed by Justice Martineau in *Djossou v Canada (Citizenship and Immigration)*, 2014 FC 1080 at paragraph 37 [*Djossou*], the Court can sometimes adopt a pragmatic approach to this issue, in circumstances where the Court's decision whether to apply the standard of reasonableness or the standard of correctness, to the RAD's identification of its own standard of review, would not be determinative of the outcome of an application for judicial review. This is a case in which the pragmatic approach can be applied. As in *Djossou*, the RAD's selection of the judicial review standard of reasonableness in the case at hand is an error regardless of the standard against which that selection is assessed.

[29] Decisions of this Court have expressed in various ways the standard of review that should be employed by the RAD in considering appeals from the RPD. In *Alvarez* at paragraph 33, Justice Shore expressed his conclusions as follows:

> The Court agrees that the RPD, as the tribunal of first instance, is owed a measure of deference with regard to its findings of fact, and of fact and law. The RPD is better situated to draw such conclusions as it is the tribunal of first instance, the trier of facts, having the advantage of hearing testimony *viva voce* (*Housen*, above). However, the RAD must nonetheless perform its own assessment of all of the evidence in order to determine whether the RPD relied on a wrong principle of law or misassessed the facts to the point of making a palpable and overriding error. The idea that the RAD may substitute an original decision by a determination that should have been rendered without first assessing the evidence is completely inconsistent with the purpose of the IRPA and the case law dealing with the virtually identical wording of subsection 67(2). The Court finds that the RAD misinterpreted its role as an appeal body in holding that its role was merely to assess, against a standard of reasonableness, whether the RPD's decision is within a range of possible, acceptable outcomes.

[30] Justice Phelan addressed the standard of review to be employed by the RAD as follows at paragraphs 54 to 55 of *Huruglica*:

> 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.
>
> 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".

[31] However, as noted by Justice Martineau in *Djossou* at paragraph 37, such decisions are consistent in concluding (regardless of the standard of review adopted by this Court) that the RAD itself should not adopt a judicial review standard when performing its appellate functions.

[32] In both *Alvarez* and *Huruglica* the articulation of the standard of review is characterized by some level of deference by the RAD to the factual findings of the RPD, at least where issues of credibility are engaged, but also by the importance of the RAD conducting its own independent assessment.

[33] I note that in his recent decision in *Denbel v Canada (Citizenship and Immigration)*, 2015 FC 629, Justice Mosely commented in *obiter* that he did not agree that the RAD should routinely conduct a fresh assessment of credibility on appeals brought before it, although he proceeded to explain that he was satisfied in any event that the RAD had made its own assessment of the applicant's credibility.

C. *Did the RAD adopt the proper standard of review in reviewing the RPD's decision?*

[34] While the RAD conducted an analysis of the standard of review, relying significantly on the decision of the Alberta Court of Appeal in *Newton v Criminal Trial Lawyers' Association* , 2010 ABCA 399, it reached its conclusions on the applicable standard without the benefit of the substantial body of jurisprudence (canvassed in part above) that has subsequently emanated from this Court.

[35] As noted above, the RAD concluded that a standard of reasonableness was applicable to questions of fact and that it must show deference to the factual and credibility findings of the RPD. The RAD found that the RPD's decision fell within a range of possible, acceptable outcomes, defensible in respect of the facts, and was therefore not unreasonable.

[36] This Court has repeatedly ruled that the RAD errs when it applies the standard of reasonableness to its review of the RPD's findings (see *Djossou*, above, at paras 6 and 7). While there is also authority for the proposition that the RAD does not commit a reviewable error when it applies the standard of reasonableness to findings of pure credibility, the RAD is still required in such circumstances to conduct its own assessment of the evidence (see *Ngandu*, above, at paras 33-34).

[37] I find the RAD's articulation of the applicable standard of review to be in error as it was lacking the important requirement to conduct its own assessment of the evidence.

D. *Did the RAD err in its review of the RPD's decision?*

[38] I agree with the respondent's submission that the fact that an assessment of the evidence is missing from the RAD's articulation of the standard does not in itself preclude a conclusion that the RAD conducted the necessary evaluation of the evidence in deferring to the RPD's credibility findings (see *Njeukam v Canada (Citizenship and Immigration)*, 2014 FC 859). However, with respect, I do not agree with the respondent that the RAD performed such an analysis of the evidence.

[39] In its consideration of the RPD's credibility findings, the RAD's analysis is limited to the following two sentences:

> … Although the RPD did not mention in its reasons how it considered the Guidelines, the RPD made an overall finding that the Appellant's allegations were not credible based on an analysis of all the evidence before it. The RPD clearly identified the credibility concerns related to the allegations; sought explanations for the credibility concerns; weighed the allegations; and made credibility findings which were clear, justified, and transparent and which were within the range of acceptable outcomes.

[40] Subsequently, in considering whether the RPD erred in failing to consider the claims under s. 97 of the Act, the RAD's decision refers to having reviewed all the evidence before it. However, in my view, the RAD's reasons do not demonstrate the required independent assessment of the evidence. Consistent with its articulation of the standard of review, it focuses upon and defers to the RAD's credibility findings without itself analyzing the evidence upon which the findings were based.

[41] With respect to the Gender Guidelines, the RAD refers to having listened to a recording of the proceeding before the RPD and, while the Gender Guidelines were not referred to in the RPD's decision, the RAD concludes based on the recording that the RPD was cognizant of and directed by the Gender Guidelines.

[42] The applicants argue that the RPD's failure to apply the Gender Guidelines and to refer to them in its decision (presumably to demonstrate such application) represents an error that should have been identified by the RAD.

[43] The Court is conscious of the importance of the Gender Guidelines, as emphasized by Justice Campbell as follows in *Griffith v Canada (Minister of Citizenship and Immigration)* (1999), 171 FTR 240 at paragraph 25 [*Griffith*]:

> If a claimant is not believed, reasons must be given. In the case of credibility findings with respect to women suffering domestic violence, in my opinion, the requirement for reasons becomes specific: the reasons must be responsive to what is known about women in this condition. The Gender Guidelines are, in fact, an effort to implement the professional education needed to accomplish this objective.
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> [Footnotes omitted]

[44] The RAD's conclusions on the RPD's consideration of the Gender Guidelines are made in conjunction with its findings on the principal applicant's credibility. The Court accepts the logic of this approach. As expressed by the RAD in relying on *Griffith*, to have properly considered the Gender Guidelines, the RPD must disclose a degree of knowledge, understanding and sensitivity in judging a claimant's statements and conduct. However, the resulting relationship between the application of the Gender Guidelines and the assessment of the principal applicant's credibility returns us to my finding that the RAD's decision does not demonstrate the necessary independent assessment by the RAD in reaching its conclusion that the RPD's credibility findings (which must be properly informed by the Gender Guidelines) were reasonable.

[45] Finally, the RAD concluded that the RPD had not erred in failing to consider the applicants' claims under s. 97 of the Act. This conclusion flows logically from the adverse credibility findings by the RPD (and in turn the RAD), as a result of which the applicants had

failed to demonstrate the personalized risk necessary to support a s. 97 claim (see *Lopez v Canada (Citizenship and Immigration)*, 2014 FC 102).

[46] However, with this matter being referred back to the RAD for re-determination, based on the error in the RAD's approach to review of the RPD's credibility findings, the question of whether the applicants' claims may meet the requirements of s. 97 will depend at least in part on the outcome of that re-determination.

[47] The parties were asked if they wished the Court to consider certification of any question for appeal. No question was raised by either party.

JUDGMENT

THIS COURT'S JUDGMENT is that:

1. the application for judicial review is allowed and the matter is referred to the RAD for re-determination by a differently constituted panel;

2. no question is certified for appeal; and

3. the style of cause in this proceeding shall be amended to show the style of cause as it is set out at the commencement of this Judgment and Reasons.

"Richard F. Southcott"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-4092-14
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