Federal Court Cour fédérale

Date: 20150410

Docket: IMM-7581-13

Citation: 2015 FC 442

Ottawa, Ontario, April 10, 2015

PRESENT: The Honourable Mr. Justice Brown

BETWEEN:

KEIRI LISBETH CHAVEZ

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Introduction

[1] This is an application for judicial review by Keiri Lisbeth Chavez [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 of Canada, Refugee Protection Division [RPD], dated November 7, 2013, in which the RPD determined that the Applicant was not a Convention refugee or a person in need of protection. The application is granted for the following reasons.

II. **Facts**

[2] The Applicant was born on May 12, 1990. She is a citizen of El Salvador. She alleges fear of persecution as a woman subject to domestic violence in El Salvador. She made the following allegations in support of her refugee protection claim:

a) In 2006, when she was 16 years old, the Applicant entered into a relationship with Juan Carlos Bonilla, who was 20 years old at the time and whom she knew from her childhood. The Applicant's family never approved of the relationship as Mr. Carlos had a bad reputation – he did not work and was consuming alcohol and drugs. The Applicant escaped family pressure by moving in with Mr. Carlos in September 2007.

b) Mr. Carlos became verbally abusive six months after the Applicant moved in with him, and then became physically abusive. Approximately one year into the relationship, the Applicant tried to end it and Mr. Carlos threatened to kill her. She feared him and knew he had a gun. The Applicant did not want to go back to her family and cause them problems, so she decided to stay with Mr. Carlos.

c) In June 2009, Mr. Carlos came home at midnight while being drunk and drugged. He had an evil look and told the Applicant he was going to kill her. He then assaulted the Applicant, punching and kicking her. She attempted to flee through the back door but Mr. Carlos grabbed her and stabbed her with a fork in the hip and in the right thumb. Mr. Carlos stopped assaulting the Applicant when his mother came to help her. The Applicant fled to a neighbour's home who runs a pharmacy and was helped with her wounds.

d) Three weeks later, Mr. Carlos came home drunk and once again assaulted the Applicant by punching her in the stomach, breast and arms and raping her, and his mother again intervened.

e) In September 2009, Mr. Carlos came home late at night, drunk and intoxicated with drugs, and demanded that the Applicant have sex with him. When she refused, he pulled out a gun and threatened to put a bullet through her head if she resisted. The Applicant was forced to have sex with Mr. Carlos. The morning after, the Applicant told Mr. Carlos' mother about the gun but she responded that there was nothing that could be done because she was afraid of him. Mr. Carlos forced the Applicant to have sex with him with a gun on another occasion as well.

f) The Applicant never reported Mr. Carlos to the police because she knew the police would not assist her. She knew another woman who had called the police because her husband had assaulted her and the police took her husband in for one night to sober up and he was then released without facing any charges. The Applicant also knew that Mr. Carlos had a cousin who was a police officer in Santa Ana and she feared that he would use his influence to ensure Mr. Carlos was not arrested or charged.

g) The Applicant believes the violence escalated as a result of her trying to end the relationship. Sometime around November 2009, Mr. Carlos again came home drunk late at night. He pulled the Applicant's hair, threw her on the floor, raped her and pointed a gun at her for resisting the rape. Mr. Carlos' mother heard the event and intervened. She told the Applicant to leave the house, so the Applicant went to a church across from Mr. Carlos' home. The pastor from the church

escorted her to her mother's home and then with her mother to the doctor. The Applicant's mother was worried about her daughter's safety as she had heard from neighbours that Mr. Carlos was hanging around with criminals who sold drugs and had been involved in robberies and assaults. Mr. Carlos had been arrested on two occasions but was never charged due to the influence of his cousin.

h) The following day, Mr. Carlos went to the Applicant's mother's home. He shouted for the Applicant to come out and threatened to kill her mother. The mother called the Applicant's father in New York and he agreed to help her out. He contacted a friend of his in El Salvador, who arranged for the Applicant to travel to the Guatemalan border where a coyote would assist her to reach the United States.

i) On November 13, 2009, the Applicant travelled to the Guatemalan border. She was able to enter the United States on December 9, 2009, but was apprehended by border patrol agents and taken to a detention centre where she was processed as a refugee claimant. She attended three immigration hearings, one in San Antonio on October 4, 2010, and two in Houston in March and April, 2011. In February 2012, the Applicant's lawyer told her that he would likely lose her case as all El Salvadoran cases were being rejected. The Applicant was scared as she had also heard of El Salvadoran cases where the claimants were immediately arrested and deported after their claims were rejected.

j) The Applicant feared her claim was going to be rejected. She called her sister in Canada for advice. Her sister told her to come to Canada. The Applicant travelled

to the Canadian border by bus and made her refugee claim in Canada on April 23, 2012.

k) After the Applicant left El Salvador, her mother told Mr. Carlos about her departure. He then started going to the Applicant's mother's home and threatened to kill the Applicant in front of her mother if she returned to El Salvador. The Applicant's mother reported the threats to the police.

[3] The RPD rejected the Applicant's claim on November 7, 2013 and leave to apply for judicial review was granted on January 5, 2015.

III. Standard of Review

[4] In *Dunsmuir v New Brunswick*, 2008 SCC 9 at paras 57, 62 [*Dunsmuir*], the Supreme Court of Canada held that a standard of review analysis is unnecessary where "the jurisprudence has already determined in a satisfactory manner the degree of deference to be accorded with regard to a particular category of question". The issues of whether the RPD erred in its credibility findings, and whether these findings were consistent with the *Chairperson's Guidelines on Women Refugee Claimants Fearing Gender-Related Persecution* [*Gender Guidelines*], are reviewable on the reasonableness standard: *Joseph c Canada (Ministre de la Citoyenneté et de l'Immigration)*, 2015 CF 393; *Zhou v Canada (Minister of Citizenship and Immigration)*, 2015 FC 5 at para 13; *Cato v Canada (Minister of Citizenship and Immigration)*, 2010 FC 1313 at para 13. In *Dunsmuir* at para 47, the Supreme Court of Canada explained what is required of a court reviewing on the reasonableness standard of review:

> A court conducting a review for reasonableness inquires into the qualities that make a decision reasonable, referring both to the process of articulating the reasons and to outcomes. In judicial review, reasonableness is concerned mostly with the existence of justification, transparency and intelligibility within the decision-making process. But it is also concerned with whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law.

[5] I recognize that findings of credibility are the heartland of the RPD's jurisdiction: *Giron v Canada (Minister of Employment and Immigration)* (1992), 143 NR 238 at 239 (FCA). In addition, the RPD is obliged to assess the evidence in a manner that is consistent with the *Gender Guidelines: Ahmed v Canada (Minister of Citizenship and Immigration)*, 2012 FC 1494 at para 8.

IV. <u>Decision under Review and Analysis</u>

[6] The RPD was satisfied as to the Applicant's identity. The determinative issue was credibility. The RPD did not find the Applicant credible for several reasons as set out below. My comments follow each.

[7] The RPD took issue with the Applicant's inconsistent description of the reasons why she believed Mr. Carlos was physically abusive towards her. In her US claim, the Applicant had stated that her former common-law partner was upset because she was unable to have his children. At the RPD hearing, the Applicant testified that Mr. Carlos mistreated her because of his drug problems. When the Applicant's past statements were put to her, she testified that it was true that her inability to bear children was the source of the initial abuse in 2009. She explained that she omitted this fact at the RPD hearing and in her Personal Information Form [PIF] because

it was a constant reminder of a great source of trauma. The RPD rejected this explanation, finding that although "this is a subject that may be difficult for the claimant to discuss, it is nevertheless a very relevant and significant detail as this was apparently the source of the problems in the couple's relationship". The RPD also noted that the Applicant was able to discuss other traumatizing events involving rape and a gun and drew a negative inference with respect to her subjective fear and credibility as a witness. Court Comment: This finding is not reasonable for two reasons. First, it is based on a misapprehension of the evidence given in the US. A review of the question and answer summary of her US testimony confirms, as the Applicant alleges, that she provided the answer regarding her inability to have children in response to a specific question concerning the first attack made upon her by Mr. Carlos in June 2009. While the RPD initially and correctly noted that this answer was in respect to a "specific incident", a page or so later, the RPD, as Applicant's counsel correctly commented, inflated this specific answer in relation to a specific incident into grounds for attacking the Applicant's general credibility. In my view, the Applicant was under no reasonable obligation to mention her infertility in her initial evidence (in her PIF narrative for example) because her condition was merely the triggering event of one of several violent attacks on her by Mr. Carlos. Therefore, it was not reasonable for her credibility to suffer on that account. The use by the RPD of the definite article "the source" was certainly not justified on the evidence. The fact that a discussion of her infertility threw Mr. Carlos into a rage on one specific occasion cannot reasonably be converted into a finding that her infertility was "the source of the problems" (note the plural) in their relationship. Subsequently the RPD in its reasons transformed this reasonable non-disclosure into something it was not, namely a "complete omission" of a "very relevant and significant detail as this was apparently the source of the problems in the couple's relationship".

In drawing this conclusion, the RPD again misconstrued the evidence. The evidence was that the source of problems in the relationship was that Mr. Carlos was a violent, aggressive and abusive person and that he was so because of drug use or otherwise. On the evidence properly construed, the source of their problems was not the Applicant's inability to have children. That is a finding which comes too close to blaming the victim instead of the perpetrator for the assaults on the Applicant's person. On the evidence, the blame for Mr. Carlos' serious and repeated abuse of the Applicant lies squarely on Mr. Carlos, not the Applicant's medical situation. Therefore, this finding is set aside. Secondly, I am unable to accept the RPD effectively equating the likely trauma occasioned to the Applicant in giving evidence regarding sexual assaults and violence against her, to the trauma entailed in revealing that she, as a young woman, is not able to have children. The first two narratives concern attacks on her by a third party, namely Mr. Carlos. Giving evidence of infertility involves disclosing a deeply personal medical issue that she had every reason to expect to keep private unless directly asked (as she was in the US). It is agreed that different testimony will provoke differing levels of trauma from different witnesses. In my view, without a better foundation, it was unreasonable for the RPD to speculate and to expect this Applicant to react similarly to the reporting of these very different situations. I set aside this finding as unreasonable also.

[8] The RPD noted some confusion regarding the sequence of certain events, namely whether one of the attacks took place on June 2009 as stated at the RPD hearing, or in November 2009 as stated in the Applicant's US claim. When confronted with this contradiction, the Applicant explained that she had told the immigration officers everything and that perhaps they had made a mistake as a result of them only asking a few questions and then putting the whole

story together. The Applicant also explained that the translation was conducted by telephone, which made it complicated and difficult for her to hear. The RPD rejected the Applicant's explanation, namely because the US interview notes indicated that the interview had been conducted in a question and answer format, that the attack discussed was clearly the June 2009 one, and that the interview was not short. The US interview notes also indicated that the Applicant had not asked for anything to be clarified at any point in the interview. The RPD consequently drew a negative inference in respect to the Applicant's subjective fear and credibility as a witness. Court Comment: The RPD was incorrect in stating that the US interview document was "not a summary". The interview notes say they are "not a verbatim transcript". I take this to mean they are a summary. However, given the centrality of the RPD's role in determining credibility, and the totality of the evidence on this point, in my view the RPD's overall finding in this connection is within the range of possible outcomes. I am not prepared to accept that as a precondition of their evidence being accepted in Canada, foreign immigration officers, or interpreters engaged by their governments, should be subject to examination in Canada. In many respects, notes of foreign interviews are simply business records legislatively admissible in Canada for the truth of their contents, and which are in any event generally admissible on a principled basis, because there is presumptively no motive for these officers to make false reports, and other policy reasons. The competence of foreign government officials at such note taking is generally a matter for the RPD to assess and determine. I should note that the US summary in this case was more contemporaneous, and therefore more likely to be reliable, than later testimony before the RPD. I agree with the Applicant that US immigration notes, and such notes from other countries, should be subject to an appropriate level of caution depending

on the circumstances in which they are made, what they purport to be, relevant country and other factors. On balance I find this aspect of the RPD's decision is reasonable.

[9] The Applicant stated in her PIF narrative that Mr. Carlos went to her mother's home while she was still in El Salvador, as well as after she left, and did not mention gun shots. At the hearing, the Applicant testified that there were gun shots at her mother's home and this occurred the first time when she was in El Salvador. Later, the Applicant testified that she was actually not in El Salvador when the gun shots happened and that her mother had told her about them. The Applicant testified that she had mentioned the gun shots to her counsel and could not explain why they were omitted from the PIF. The RPD rejected this explanation as the Applicant had affirmed at the start of the hearing that her PIF, including amendments, was complete, true and correct. The RPD found that the Applicant was embellishing her story and again drew a negative inference in respect to her subjective fear and credibility as a witness. Court Comment: This finding is also reasonable on the evidence, given the RPD's role in assessing credibility.

[10] The RPD took issue with the Applicant being unsure of precisely what Mr. Carlos' age was. She said he could be 25-26 as he is two years older than her and that his birth day is "around September 14", but she said she did not know the year in which he was born. The RPD found it implausible that someone in the Applicant's position, who was in a relationship with Mr. Carlos from the age of 16 to 19 and who had spent two years with him, would not know his birth day or even the year of his birth. The RPD again drew a negative inference in respect to the Applicant's subjective fear and credibility as a witness, and found it implausible that she would not know this information about Mr. Carlos. Court Comment: The record shows that the

Applicant knew Mr. Carlos' birth day except in one respect. Her evidence in the US and in Canada was consistently that he was two years older than she was. The Applicant correctly stated his day of birth as "14SEPT19??" in her original claim for refugee status. She never hid the fact that she did not know what year he was born. Despite this, the RPD seized on the fact that the transcript reported that the Applicant said "around" in relation to the day of his birth, and concluded she knew neither his birth day nor his birth year. The RPD was correct to do so regarding the birth year, but that was never in issue. The RPD erred with respect to the birth day: the Applicant never wavered on it being September 14, except by her reported use of the word "around". On judicial review, the Applicant filed an affidavit of an English Spanish assistant in a law office, to the effect that the word "around" was not used by the Applicant but was added by the interpreter, based on the oral recording of the hearing. The RPD did not follow up on the day of birth issue with the Applicant even though her testimony differed from her original claim. Nor was the Applicant's affiant cross-examined on this point. While at the very low end of what is required, in the circumstances of this case, I find that there was or may have been a translator error in respect of which the Court has some evidence before it, in addition to the Applicant's allegation of error. In *Huseynova v Canada (Minister of Citizenship and Immigration)*, 2011 FC 408, at para 10, this Court held:

> [10] The Applicant suggests that the confusion in this area of testimony resulted from problems with the translation of the nuances of language. If the Applicant wished to seriously make that claim, she ought to have produced evidence. If, for some reason, certain words are nuanced and may lead to different choices of words by the translator or words and concepts not readily translatable into English, then the proper way to proceed is by way of expert or at least knowledgeable evidence of this linguistic/translation issue. There was no such evidence here.

I conclude that it is unsafe to fault the Applicant for not knowing Mr. Carlos' birth year.

[11] Based on all of the inconsistencies noted, the RPD found a general lack of credibility on the part of the Applicant which extended to all relevant evidence emanating from her testimony. The RPD found that it was more likely than not that the Applicant was not a victim of domestic violence as she has alleged. Court Comment: The finding of general credibility is undermined by the weaknesses identified above. Seen as a whole, it is not possible to determine which of these several factors led to the RPD's conclusions, and it is therefore unsafe to allow the general credibility finding to stand. It must be set aside, and with it goes the RPD's finding that the Applicant was not the victim of abuse.

[12] The RPD stated that it took into consideration the Applicant's profile of a young unsophisticated lady with a grade 9 education, as well as the *Gender Guidelines*. Court Comment: While counsel for the Respondent is correct in submitting that the RPD showed some courtesy to the Applicant (as was to be expected), I am not satisfied that the *Gender Guidelines* were applied by the RPD in coming to its decision. Reasons "bookended" with mention of the *Gender Guidelines* at the beginning and end, but without references or discussion in between as the evidence is assessed, are danger signals for reviewing courts: *Danelia v Canada (Minister of Citizenship and Immigration)*, 2014 FC 707 at para 31; *Keleta v Canada (Minister of Citizenship and Immigration)*, 2005 FC 56 at paras 14-15. As is well known, the RPD must not only refer to the *Gender Guidelines*, it must also apply them. I appreciate that the *Gender Guidelines* are not a cure all, nor a get out of jail card, and that the RPD may still find an applicant's credibility wanting even when applying these guidelines correctly. In this case, however, I would have expected the *Gender Guidelines* to be considered at least in connection with the RPD's unreasonable finding that the Applicant's inability to have children was "the source of the

problems in the couple's relationship". However, the *Gender Guidelines* were not considered or applied there or elsewhere, and the end result may very well have been different. I feel compelled to set aside the analysis on this ground.

[13] The RPD noted letters from the Applicant's mother, neighbour, doctor and pastor, but explained that it had "no way of assessing their origins", and they did not contain "security features". The RPD also noted some inconsistencies between the content of three of the letters and the Applicant's testimony, namely that they (letters from the pastor, the mother and the neighbour) mentioned that the pastor took the Applicant to the doctor first and then to her mother's home. The Applicant explained that the notary wrote the letters based on what her mother had to say and made the mistake. The RPD rejected the Applicant's explanation that the notary had made the mistake, namely because it was unlikely that the notary would make the same mistake on three different letters. The RPD found that the Applicant was again trying to shift the blame for her inconsistent evidence. In light of the credibility concerns, the RPD gave these letters little weight in terms of establishing the Applicant's allegations. Court Comment: Given the disposition of this matter, it is only necessary to comment on the assessment of the physician's letter in support of the Applicant's claim, which reads:

> I, Rebeca Hernandez de Flores, an adult, Medical Doctor, with residence in the Municipality of San Alejo, Department of La Union, with Sole ID Document No: 04598435-1 assisted Keiri Lizbeth Chavez, on 11 November 2009 at evening hours as she had several blows to her head, thorax and these were very serious injuries to her head and thorax and she suffered psychological trauma. As a professional, it was my duty to ask her how she received those blows and she told me that she was having many problems with her partner and he was assaulting her.
>
> As a result of the physical and psychological trauma that Ms. Keiri had, I referred her to a psychologist as she was very nervous, shaking and was crying.

> To certify the above, I signed and sealed this document in the Municipality of San Alejo, Department of La Union, on the 23rd day of the month of May 2013.

The RPD was mistaken to say the physician's letter had no "security features". The physician's letter was signed by the physician and her signature was attested to by a notary who, in addition, signed the letter and affixed his or her stamp and seal. The Respondent suggests it could have been on letterhead which, while true, misses the point. The point is, the physician's letter had security features, and the RPD was incorrect to find otherwise; the finding was contrary to the evidence. In addition, it is important to note that the report of the treating or attending physician is not contradicted in a single respect by any other evidence. Whatever may be said about the letters from the pastor, mother and neighbour, the physician's letter is unchallenged. It was illogical and contrary to the evidence to reject the physician's letter because the RPD had issues with other documents or the evidence of other parties. Moreover, and in fact, the physician's letter corroborated the Applicant's evidence regarding the nature of the attack on the Applicant. It stated, in part, "she had several blows to her head, thorax and these were very serious injuries to her head and thorax and she suffered psychological trauma. As a professional, it was my duty to ask her how she received those blows and she told me that she was having many problems with her partner and he was assaulting her". None of these points were considered by the RPD. In my view, the RPD was not entitled to overlook the physician's letter. While I recognize that the RPD is not obliged to refer to every piece of evidence before it (*Newfoundland and Labrador Nurses' Union v Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62 at para 16), a reviewing Court may infer, as I do, that specific evidence was overlooked if it was important to the case and not referred to or analyzed: *Hassan v Canada (Minister of Employment and Immigration)* (1992), 147 NR 317 (FCA); *Goman v Canada*

(Minister of Citizenship and Immigration), 2012 FC 643 at para 13; *Urrea Bohorquez v Canada (Minister of Citizenship and Immigration)*, 2011 FC 808 at para 13; *Saraci v Canada (Minister of Citizenship and Immigration)*, 2005 FC 175 at para 33. This letter is not like a paragraph buried in a mountain of country condition documents. It is a simple and direct account confirming that the Applicant was the victim of a vicious and violent attack. In this respect, the case at bar is all but indistinguishable from *Lumaj v Canada (Citizenship and Immigration)*, 2012 FC 763 at para 70:

> [70] The RPD muses about the Physician's Report but nowhere tells us what weight it should have, or whether it is accepted as evidence, or rejected. At the same time, this letter is crucial to the Principal Applicant's account that she was raped. If accepted, it directly contradicts the RPD's finding that the "account of the rape has been created to support the claim." The Physician's Report was so crucial that the RPD was obliged to address it and provide clear findings on whether it was accepted and what weight it should receive. It goes to the heart of the Decision and yet the RPD does not address it. This is a reviewable error. See *Cepeda-Gutierrez v Canada (Minister of Citizenship and Immigration)*, [1998] FCJ No 1425 at paragraph 15 and *O.E.N.R. v Canada (Minister of Citizenship and Immigration)* 2011 FC 1511 at paragraphs 35 and 36.

V. **Conclusions**

[14] Stepping back, and reading the RPD's decision in its entirety and as a whole as this Court is required to do, I find that the decision, while reasonable in some respects, overall does not fall within the range of possible, acceptable outcomes that are defensible in respect of the facts and law.

[15] Neither party proposed a question to certify and none arises.

[16] The application for judicial review should be allowed, and no question is certified.

JUDGMENT

THIS COURT'S JUDGMENT is that the application for judicial review is allowed, the decision of the RPD is set aside, the matter is remitted for reconsideration 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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