

Federal Court



Cour fédérale

Date: 20151028

Docket: IMM-2108-15

Citation: 2015 FC 1217

[UNREVISED ENGLISH CERTIFIED TRANSLATION]

Montréal, Quebec, October 28, 2015

PRESENT: The Honourable Mr. Justice Shore

BETWEEN:

MARIBEL PUPO TAMAYO

Applicant

and

**THE MINISTER OF CITIZENSHIP AND
IMMIGRATION**

Respondent

JUDGMENT AND REASONS

I. Introduction

[1] This is an application for judicial review pursuant to subsection 72(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA], of a decision by the Refugee Appeal Division [RAD] of the Immigration and Refugee Board, dated April 14, 2015, rejecting the applicant's refugee protection claim.

II. Facts

[2] The applicant, Maribel Pupo Tamayo, is a nurse and a citizen of Cuba.

[3] The applicant alleges that it all began back on July 24, 2010, after she refused to take part in acts of repudiation and denunciation against people who had taken part in a demonstration near her workplace. In retaliation, she was detained by the authorities for four hours, and her name was taken off the list of persons allowed to travel.

[4] She alleges that her problems continued at work, where she was informed by her supervisor that a file had been [TRANSLATION] “opened” on her and that she could lose her nursing credentials and that she would have to work on holidays. In addition, she was also required to work in a psychiatric hospital after a meeting in which she expressed her disapproval for a decision to send medical supplies to another country. Finally, the applicant claims that, after it was discovered that she had left Cuba, she lost her job and was blamed for the disappearance of some medical supplies, and that her former boss, too, experienced difficulties.

[5] The applicant left Cuba and arrived in Canada on May 19, 2013, as a visitor, to help her daughter, who was about to give birth. A refugee protection claim was filed on October 8, 2013. The Refugee Protection Division [RPD] rejected the applicant’s claim on December 18, 2013. The RPD concluded, among other things, that the applicant was not credible because she made allegations in her testimony before the RPD that had not been written down in her Basis of Claim

Form [Form]. The RPD also concluded that the applicant had not been persecuted, either individually or cumulatively.

[6] In her RAD appeal record, the applicant provided a statement to the effect that she had given the grounds for her refugee protection claim to her counsel in Spanish, but that her counsel could not find an interpreter and transcribed all the grounds into the Form herself.

[7] The RAD, in a decision dated March 10, 2014, confirmed the RPD's decision. The application for judicial review of the RAD's decision dated March 10, 2014, was allowed because the RAD had applied the wrong standard of review to the RPD's decision (*Tamayo v Canada (Minister of Citizenship and Immigration)*, 2014 FC 1127). Later, in another decision, dated April 14, 2015, the RAD confirmed the decision of the RPD. That is the decision in issue in the present application for judicial review.

III. RAD decision

[8] The RAD, in its decision dated April 14, 2015, applied the standard of review described in *Spasoja v Canada (Minister of Citizenship and Immigration)*, 2014 FC 913, which states that the RAD must apply the correctness standard to questions of law and the palpable and overriding error standard to questions of fact and questions of mixed fact and law. The RAD found that this standard applied, particularly when "no new evidence is submitted before the RAD and no hearing is held" (RAD Decision, para 34). In its decision, the RAD analyzed two issues, namely, the RPD's assessment of the applicant's credibility and the RPD's analysis of the concept of persecution.

[9] On the issue of credibility, the RAD held that the RPD was correct in finding that the applicant lacked credibility. Her failure to present all the grounds for her refugee protection claim in the Form was a major omission. The onus was on the applicant to review the Form before the hearing and to mention at the beginning of the hearing that the Form was incomplete, or at least that she was unaware of its contents. The RAD also concluded that the RPD did not have to consider the explanations given by counsel for the applicant before the RPD, namely, that the omissions were her fault and that her client should not have to suffer the consequences. The role of the RPD is not to determine who is at fault; the onus was on the applicant or her counsel to raise the deficiencies in the Form at the beginning of the RPD hearing.

[10] On the issue of cumulative persecution, the RAD confirmed that the RPD did not err in its analysis of the concept of persecution, finding that, even when taken collectively, the events raised by the applicant did not amount to persecution. The RAD defined persecution as a serious and repeated violation of a fundamental right. In short, the RAD determined that the applicant was not a Convention refugee or a person in need of protection within the meaning of the IRPA.

IV. Issues

[11] The Court is of the opinion that the application raises the following issues:

- 1) Did the RAD err in not considering the explanations given by the applicant and her counsel before the RPD?
- 2) Is the RAD's finding regarding the alleged persecution of the victim unreasonable?

V. Statutory provisions

[12] The following statutory provisions in the IRPA apply:

Convention refugee

96. A Convention refugee is a person who, by reason of a well-founded fear of persecution for reasons of race, religion, nationality, membership in a particular social group or political opinion,

(a) is outside each of their countries of nationality and is unable or, by reason of that fear, unwilling to avail themselves of the protection of each of those countries; or

(b) not having a country of nationality, is outside the country of their former habitual residence and is unable or, by reason of that fear, unwilling to return to that country.

Person in need of protection

97. (1) A person in need of protection is a person in Canada whose removal to their country or countries of nationality or, if they do not have a country of nationality, their country of former habitual residence, would subject them personally

(a) to a danger, believed on substantial grounds to exist, of torture within the meaning of Article 1 of the Convention

Définition de « réfugié »

96. A qualité de réfugié au sens de la Convention — le réfugié — la personne qui, craignant avec raison d'être persécutée du fait de sa race, de sa religion, de sa nationalité, de son appartenance à un groupe social ou de ses opinions politiques :

a) soit se trouve hors de tout pays dont elle a la nationalité et ne peut ou, du fait de cette crainte, ne veut se réclamer de la protection de chacun de ces pays;

b) soit, si elle n'a pas de nationalité et se trouve hors du pays dans lequel elle avait sa résidence habituelle, ne peut ni, du fait de cette crainte, ne veut y retourner.

Personne à protéger

97. (1) A qualité de personne à protéger la personne qui se trouve au Canada et serait personnellement, par son renvoi vers tout pays dont elle a la nationalité ou, si elle n'a pas de nationalité, dans lequel elle avait sa résidence habituelle, exposée :

a) soit au risque, s'il y a des motifs sérieux de le croire, d'être soumise à la torture au sens de l'article premier de la

Against Torture; or
(b) to a risk to their life or to a risk of cruel and unusual treatment or punishment if

(i) the person is unable or, because of that risk, unwilling to avail themselves of the protection of that country,

(ii) the risk would be faced by the person in every part of that country and is not faced generally by other individuals in or from that country,

(iii) the risk is not inherent or incidental to lawful sanctions, unless imposed in disregard of accepted international standards, and

(iv) the risk is not caused by the inability of that country to provide adequate health or medical care.

(2) A person in Canada who is a member of a class of persons prescribed by the regulations as being in need of protection is also a person in need of protection.

Convention contre la torture;
b) soit à une menace à sa vie ou au risque de traitements ou peines cruels et inusités dans le cas suivant :

(i) elle ne peut ou, de ce fait, ne veut se réclamer de la protection de ce pays,

(ii) elle y est exposée en tout lieu de ce pays alors que d'autres personnes originaires de ce pays ou qui s'y trouvent ne le sont généralement pas,

(iii) la menace ou le risque ne résulte pas de sanctions légitimes — sauf celles infligées au mépris des normes internationales — et inhérents à celles-ci ou occasionnés par elles,

(iv) la menace ou le risque ne résulte pas de l'incapacité du pays de fournir des soins médicaux ou de santé adéquats.

(2) A également qualité de personne à protéger la personne qui se trouve au Canada et fait partie d'une catégorie de personnes auxquelles est reconnu par règlement le besoin de protection.

VI. Parties' positions

[13] On the one hand, the applicant submits that there is a presumption that when a claimant swears, under oath, to the truth of certain allegations, this creates a presumption that those

allegations are true, unless there is some reason to doubt their veracity (*Maldonado v Canada (Minister of Employment and Immigration)*), [1979] FCJ No 248, [1980] 2 FC 302). The applicant submits that she made a statement in her appeal to the RAD to the effect that she had given the grounds for her refugee protection claim to her counsel in Spanish and that it was not until the day of the RPD hearing that she realized that this information was not in the Form. She further submits that in its decision, the RAD did not mention this statement and merely adopted the argument of the RPD. It was unreasonable to expect the applicant to raise, at the beginning of the hearing, the information missing from the Form, since she did not know that the Form was incomplete. The RAD could not ignore the explanations given by the applicant. Regarding persecution, the RAD should have followed the principles laid down in *Mete v Canada (Minister of Citizenship and Immigration)*, 2005 FC 840 (particularly paragraphs 4 to 6), to the effect that the context in which the events occurred must be considered, as must the persistent nature of the annoyances. In short, the RAD's findings were not reasonable.

[14] On the other hand, the respondent submits that the applicant's claims that the RAD did not consider the explanations given by her and her counsel before the RPD regarding the omissions from the Form are without merit. In paragraphs 45 and 46 of its decision, the RAD discusses the explanations given by the applicant and concludes that the onus was on the applicant or her counsel to raise the deficiencies at the beginning of the hearing before the RPD. Regarding the concept of persecution, the respondent submits that the RAD set out the established principles concerning persecution and applied them to the facts. In so doing, it was reasonable for the RAD to conclude that the incidents alleged by the applicant could not be

characterized as acts of discrimination that were sufficiently serious and systemic to constitute persecution. In short, the RAD's findings were reasonable.

VII. Standard of review

[15] The RAD's findings regarding the applicant's credibility are a question of fact, whereas its conclusions regarding the concept of persecution are a question of mixed fact and law. The RAD's conclusions regarding questions of fact and questions of mixed fact and law must be reviewed in accordance with the reasonableness standard (*St Louis v Canada (Minister of Citizenship and Immigration)*, 2015 FC 996; *Perez v Canada (Minister of Citizenship and Immigration)*, 2015 FC 1100). The RAD's decision is reasonable if it is justifiable, transparent and intelligible and falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law (*Dunsmuir v New Brunswick*, 2008 SCC 9, [2008] 1 SCR 190 at para 47).

VIII. Analysis

[16] When deciding a refugee protection claim, the RAD has a duty to consider the IRPA's objectives with respect to refugees, specifically, that the refugee program is in the first instance about saving lives and offering protection to the displaced and persecuted, and that, as a fundamental expression of Canada's humanitarian ideals, fair consideration is granted to those who come to Canada claiming persecution (paragraphs 3(2) (a) and (c) of the IRPA).

[17] Similarly, refugee protection claimants must base their claims on credible evidence on which either the RPD or the RAD can make a favourable decision (see in particular subsection 107(2) and paragraphs 170(h) and 171(a.3) of the IRPA). In *Rahal v Canada (Minister of Citizenship and Immigration)*, 2012 FC 319, at paragraphs 41 to 46, Justice Mary J. L. Gleason stated the general principles regarding credibility. First, she noted that the Court's role is a very limited one because the RPD has expertise in the subject matter and had the advantage of hearing the witnesses testify and observing their demeanor. The other principles are summarized in *Hos v Canada (Minister of Citizenship and Immigration)*, 2015 FC 791 at para 27 [*Hos*]:

[27] The other key principles noted by Justice Gleason in *Rahal*, which I would characterize as hallmarks of a credibility assessment, have been summarized below:

- * Contradictions in the evidence, particularly in the applicant's own testimony, will provide a reasonable basis for finding the claimant to lack credibility, but such contradictions must be real and more than trivial or illusory.

- * While the sworn testimony of the applicant is to be presumed to be true in the absence of contradiction, it may reasonably be rejected if the RPD finds it to be implausible. A finding of implausibility must be rational, sensitive to cultural differences and clearly expressed.

- * The Board may consider the demeanor, including hesitations, vagueness and changes or elaboration of the story in assessing credibility, but it is preferable if there are also other objective facts to support the credibility finding.

- * The Board must make clear credibility findings with sufficient particulars.

(*Rahal*, at paras 43-46.)

[18] The RPD made negative findings regarding the applicant's credibility, given that the applicant testified before the RPD regarding events that had not been mentioned in her Basis of Claim Form [BOC Form]. As the RPD stated, this was a major omission, and because of that omission, the RPD did not believe the additional allegations made by the applicant in her testimony. At the RPD hearing, counsel for the applicant acknowledged that the failure to record the information in the Form was her fault. The RAD did indeed recognize this admission in its decision:

[45] As the appellant submits, it is true that, in its reasons, the RPD did not mention the explanation submitted by the lawyer representing her before the RPD, namely that the omission was her fault and that she argued that her client should not suffer the consequences.

(RAD Decision, para 45)

[19] There can be no doubt that, if not for this admission by the lawyer who was representing the applicant before the RPD, the omissions from the Form would have a significant impact on the applicant's credibility, given that the omissions from the Form are not minimal and directly concern the very basis of the refugee protection claim (*Hamidi v Canada (Minister of Citizenship and Immigration)*, 2015 FC 243, at paras 27-28). In its decision, the RAD disregarded the applicant's explanations and concluded that the fact that the RPD did not consider the admissions of counsel for the applicant before the RPD was not an error *per se*:

[45] . . . [R]egardless of whose [TRANSLATION] "fault" it is, the fact remains that the appellant herself, as much as her counsel, had the opportunity, if not the obligation, to mention at the start of the hearing that the BOC Form was not complete, if such was the case.

(RAD Decision, para 45)

[20] The applicant testified before the RPD that she did not learn of the omissions from the Form until the day of the hearing. This was allegedly confirmed at the RPD hearing by the lawyer representing her at that time. In this case, it is important to note that the applicant did not contradict the information in her Form; she merely added allegations that were not already in it. Furthermore, both the RPD and the RAD relied solely on the omissions from the Form in finding that the applicant's new allegations were not credible. No other grounds were raised by the RPD and the RAD in finding the applicant not to be credible.

[21] The present case must be distinguished from *Hos*, above, in which Justice Catherine M. Kane found that it was reasonable for the RPD to draw unfavourable conclusions regarding the applicant's credibility even if the RPD did not consider the applicant's statement to the effect that his counsel was at fault for the omission from the BOC Form. It is important to note that Justice Kane arrived at this conclusion after noting that the RPD had based its decision on several other omissions and contradictions:

[39] The respondent submits that even if the omission were due to the applicant's lawyer's failure to include this incident, and noting that the applicant signed a blank form, it was still open to the Board to note this significant omission. In addition, it was only one of many omissions and contradictions that led to the Board's credibility findings. [Emphasis added.]

(*Hos*, above at para 39)

[22] The case at hand cannot be compared to *Hos*. Because the risk to the applicant could be considerable, the RAD had an obligation to analyze all the evidence regarding the allegations on which the applicant based her refugee protection claim, to ensure that the result complied with objectives for refugees in the IRPA, as stated above. Given the foregoing, and knowing that the

applicant did not have access to an interpreter when filling out her BOC Form and was not at all aware of the omissions from her BOC Form, counsel for applicant clearly admitted having made this serious mistake of omission because she had not had the time to fill out the BOC Form within the required deadline. Counsel for the applicant stated that the applicant should not be put in danger because of her own serious mistake.

IX. Conclusion

[23] The Court therefore concludes that the RAD's decision does not fall within the range of possible, acceptable outcomes. Accordingly, the application for judicial review is allowed.

JUDGMENT

THE COURT ORDERS AND ADJUDGES that this application for judicial review be allowed and that the matter be referred back to a differently constituted panel for reconsideration. No question is certified.

“Michel M.J. Shore”

Judge

Certified true translation
Michael Palles

FEDERAL COURT
SOLICITORS OF RECORD

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