Federal Court  Cour fédérale

Date: 20160407

Docket: IMM-2920-15

Citation: 2016 FC 388

Vancouver, British Columbia, April 7, 2016

PRESENT: The Honourable Mr. Justice Diner

BETWEEN:

DOROTHY ANJIEH KETCHEN

Applicant

and

MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Nature of the Matter

[1] This is a judicial review, pursuant to subsection 72(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [the Act], of a decision [the Decision] by the Refugee Appeal Division [the RAD] confirming a decision by the Refugee Protection Division [the RPD] that the Applicant is neither a Convention refugee, nor a person in need of protection. The Decision is dated June 10, 2015. The Applicant asks that the Decision be returned due to reviewable errors in

the admission of evidence, in the conclusions reached, and in a failure to convoke an oral hearing.

[1] After considering the issues, I find the decision reasonable on all fronts and thus I am unable to grant judicial review, despite the best efforts of counsel to persuade the Court otherwise.

II. Background

[2] The Applicant, Dorothy Anjieh Ketchen, is a citizen of Cameroon. She alleges that she was a member of the Southern Cameroons National Council [the SCNC], a political movement that advocates regional separation from the rest of the country. On September 30, 2011, as a result of her political opinion, she alleges that she was arrested by the police, detained for over a week, raped, beaten, and mistreated.

[3] On October 1, 2013, she alleges that the police broke into her apartment while she was not home. She then went into hiding in a small village named Yoke. While in hiding, an agent arranged a visa for her to travel to Canada. In that visa application, she submitted a picture of herself with her alleged husband. At the RPD hearing, however, she admitted that she did not know the man in the picture and that the agent was responsible for the contents of the application.

[4] She arrived in Canada on May 13, 2014 and claimed refugee status the next day.

[5] On August 8, 2014, the RPD dismissed her claim. The RPD found that the Applicant's testimony was vague and inconsistent and that there was insufficient credible evidence to conclude that she was a member of the SCNC, that she had been detained, or that she was being pursued by the authorities.

III. Decision Under Review

[6] The RAD first noted that the Applicant had made evidence available to the RAD that she had not submitted to the RPD. That evidence fell into two categories: (i) medical evidence and (ii) spousal evidence. Evidence from the first category related to information about the alleged 2011 attacks, including a hospital report and photos. Evidence from the second category came in the form of a 2015 Affidavit from the alleged common-law spouse, including a warrant and a recognizance.

[7] The RAD noted that all of these documents had been submitted two months after her appeal to the RAD was perfected as part of an "Application to File Documents or Written Submissions not previously provided" under Rule 37 of the *Refugee Appeal Division Rules*, SOR/2012-257 [the RAD Rules]. The RAD thus turned to subsection 110(4) of the Act to determine whether that evidence could be considered:

> 110. (4) On appeal, the person who is the subject of the appeal may present only evidence that arose after the rejection of their claim or that was not reasonably available, or that the person could not reasonably have been expected in the circumstances to have presented, at the time of the rejection.

[8] The RAD also noted Rule 29 the RAD Rules, which outlines procedure for late documentary evidence:

> 29. (1) A person who is the subject of an appeal who does not provide a document or written submissions with the appellant's record, respondent's record or reply record must not use the document or provide the written submissions in the appeal unless allowed to do so by the Division.
>
> (2) If a person who is the subject of an appeal wants to use a document or provide written submissions that were not previously provided, the person must make an application to the Division in accordance with rule 37.
>
> (3) The person who is the subject of the appeal must include in an application to use a document that was not previously provided an explanation of how the document meets the requirements of subsection 110(4) of the Act and how that evidence relates to the person, unless the document is being presented in response to evidence presented by the Minister.
>
> (4) In deciding whether to allow an application, the Division must consider any relevant factors, including
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> (a) the document's relevance and probative value;
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> (b) any new evidence the document brings to the appeal; and
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> (c) whether the person who is the subject of the appeal, with reasonable effort, could have provided the document or written submissions with the appellant's record, respondent's record or reply record.

[9] The RAD then assessed each of the pieces of this late evidence. The RAD found first that the Applicant had not provided a sufficient explanation as to why the medical evidence had not been submitted in a timely manner, since the alleged attack occurred in 2011 and the RPD had specifically raised an absence of medical records as an issue and even provided the Applicant a three-week post-hearing window to submit them. As a result, the RAD determined that these documents did not meet the requirements of Rule 29(3) and refused to admit them into evidence.

[10] As for the second set of evidence – the common-law spouse's Affidavit and associated documents – the RAD noted that despite the fact that he was apparently released from detention more than four months before the Applicant perfected her appeal, no explanation was given as to why this evidence was submitted late. Nonetheless, the RAD chose to accept it.

[11] The RAD then stated that, as per *Huruglica v Canada (Citizenship and Immigration)*, 2014 FC 799 at para 54 [*Huruglica FC*], it would conduct a hybrid appeal of the RPD decision, conducting an independent assessment of the claim and deferring only where the RPD has a clear advantage in reaching a conclusion (i.e. on issues of credibility).

[12] Overall, the RAD agreed with the RPD that the Applicant's testimony was inconsistent, inarticulate, and often "reactive and manufactured".

[13] On the question of SCNC membership, the RAD found her testimony contradictory and the evidence insufficient. Her story on joining had changed over time, her membership card appeared new, rather than appropriately aged, and the RAD did not believe that the police would have returned it to her after her detention in 2011. The RAD also found that the Applicant's allegation that she occupied a leadership role in the SCNC was not credible. She was unable at the RPD hearing to outline the principles or leadership structure of the SCNC and unable to provide detail about what it meant to be a member of the SCNC or what she did for them after her 2011 detention. The RAD concluded on a balance of probabilities that she was not a member of the SCNC.

[14] The RAD then considered the 2011 detention. The RPD drew a negative inference from the fact that the Applicant provided no detail of her detention on her Basis of Claim form [BOC] and later contradicted her BOC in her oral testimony. The Applicant argued that this was because she lacked proper counsel when she filed the BOC and so did not know what to include. The RAD, however, found that she is well-educated, trained as a lawyer, that her first language is English, and that the instructions on the BOC were clear that more detail was required. The RAD found, for example, that she alleged she had been hospitalized after the 2011 detention for two weeks, a major incident that should reasonably have been included on her BOC. The RAD concluded that she had not demonstrated on a balance of probabilities that she had been detained and hospitalized as a result.

[15] The RAD also determined that the Applicant's submissions on her relationship with her common-law spouse, along with his employment and his role in the SCNC, were vague, inconsistent, and that it was not clear where she lived in Cameroon and when. The RAD noted the new evidence provided – including the recognizance of surety and the warrant – but gave these materials little value, however, because of the Applicant's impugned credibility and because of documentary evidence noting the problem of fraudulent documents in Cameroon.

[16] Finally, the RAD agreed with the RPD that the Applicant's submissions on the 2013 incident and her decision to go into hiding were problematic. Again, the BOC lacked detail on these points and the RAD drew a negative inference from the discrepancy between that detail and the detail provided at the oral hearing. The RAD also noted that the Applicant was hesitant in describing why she selected Yoke and why she failed to list her address in Yoke on her BOC.

The RAD found, ultimately, that the Applicant did not go into hiding in Yoke in 2013 for seven months. It further noted the implausibility created by her account of applying for a national identity card at a police station when she was in hiding from the police, who were allegedly searching for her.

[17] The RAD concluded by noting that the Applicant had not provided sufficient credible evidence to demonstrate that she was a victim of persecution in Cameroon and by confirming the RPD's negative determination.

IV. Analysis

[18] The Applicant argues in her pleadings that the RAD made reviewable errors in rejecting the new hospital evidence, in applying the wrong standard of review to the RPD decision, and in failing to convoke an oral hearing.

[19] In terms of the standard of review for questions about the admissibility of evidence, the RAD's interpretation of subsection 110(4) and its application to the facts of a given case are reviewable on a reasonableness standard (*Canada (Citizenship and Immigration) v Singh*, 2016 FCA 96 at para 29 [*Singh FCA*]). Similarly, the second error, regarding the decision itself as it relates to the determination and application of a standard of review, also attracts a reasonable standard (*Canada (Citizenship and Immigration) v Huruglica*, 2016 FCA 93 at para 35 [*Huruglica FCA*]), as does the third error, which involves the application of subsection 110(6) to the facts (*Tchangoue v Canada (Citizenship and Immigration)*, 2016 FC 334 at para 12; *Sanmugalingam v Canada (Citizenship and Immigration)*, 2016 FC 200 at para 36). It is trite law

that the Court must therefore take a deferential approach and resist imposing its own analysis: if the decision is an acceptable and rational solution that is justifiable, transparent and intelligible, it should not be disturbed (*Dunsmuir v New Brunswick*, 2008 SCC 9 at para 47).

A. *Did the RAD err in rejecting the new evidence?*

[20] According to the Applicant, the RAD erred in law in ignoring the evidence before it since that evidence met the requirements of subsection 110(4) of the Act. The Applicant argues that the new evidence, had it been accepted, would have clearly rebutted the central findings of the RPD and would have confirmed the risk of persecution in Cameroon.

[21] The Applicant relies on *Singh v Canada (Citizenship and Immigration)*, 2014 FC 1022 [*Singh FC*], where the judge compared subsection 110(4) and paragraph 113(a) of the Act. She concluded that paragraph 113(a) and the jurisprudence that relates to it – specifically *Raza v Canada (Citizenship and Immigration)*, 2007 FCA 385 [*Raza*] – should not apply to subsection 110(4). Ultimately, according to the judge, when assessing whether new evidence should be admitted, "the RAD should provide some leeway to appellants in order to allow them to respond to evidentiary weaknesses that the RPD may have found in the record" (*Singh FC* at paras 55).

[22] I should note that, between the time of the hearing before this Court and the time of this decision, the Federal Court of Appeal released *Singh FCA*, which overturned *Singh FC* on the ground of the applicability of *Raza* and found that "[e]xcept for the materiality of evidence, which does not lend itself to the same analysis in an appeal and which subsection 110(6) already considers in determining whether a new hearing should be held, it is not necessary to interpret

subsection 110(4) and paragraph 113(a) differently" (para 64). There, Mr. Singh had failed before the RPD to establish his identity because he had not submitted his grade 12 diploma – which had been seized by Canadian immigration authorities and was thus not in his possession. The RAD determined that the fault lay not with Mr. Singh, but rather with his lawyer, and thus refused to admit the diploma into evidence. The Federal Court of Appeal concluded that this was a reasonable application of the subsection 110(4) requirements and that "there are very good reasons why Parliament would favour a restrictive approach to the admissibility of new evidence on appeal" (*Singh FCA* at para 49).

[23] Even in the absence of the Federal Court of Appeal's recent decision in *Singh FCA*, it would be difficult to find the RAD's application of subsection 110(4) in this case unreasonable. Ms. Ketchen has provided no explanation for why the medical documents were not submitted in a timely fashion. She simply stated that "she could not lay her hands on the [hospital] report" until after the RPD hearing. This Court's position before *Singh FCA* was released was that the Applicant's delay was not reasonable – contrary to what subsection 110(4) and Rule 29 require – and *Singh FCA* affirms this conclusion. The RAD's exclusion of the newly presented medical evidence was thus entirely acceptable.

[24] Furthermore, the RAD actually accepted a substantial portion of the evidence (from the fiancé), even thought that evidence did not strictly meet the requirements of Rule 29. This evidence was admitted, considered, weighed, and ultimately given low probative weight, which was entirely open to the tribunal given the full context, including the foundation upon which the negative credibility assessment was based.

B. *Did the RAD err in applying the wrong standard of review to the RPD's decision?*

[25] The Applicant argues that the RAD erred in deferring to the RPD's findings on her SCNC membership and thus failing to conduct the independent assessment required of it under *Huruglica FC*.

[26] The Respondent, by contrast, argues that the RAD was explicit that it conducted an independent assessment and considered the totality of the evidence. The Decision was lengthy, detailed, and thorough on this point. It identified multiple problems with the Applicant's claim, including discrepancies around the Applicant's membership in and knowledge of the SCNC and the Applicant's relationship with her alleged common-law spouse.

[27] As with *Singh FC* and *Singh FCA*, the Federal Court has recently provided clarification on this point. The RAD relied, in conducting its analysis, on the directions of Justice Phelan in *Huruglica FC*. Those directions have since been supplanted by the Federal Court of Appeal in *Huruglica FCA*. There, Justice Gauthier clarified that the RAD must review RPD decisions on a correctness standard, carefully considering the RPD decision before carrying out "its own analysis of the record to determine whether, as submitted by the appellant, the RPD erred" (*Huruglica FCA* at para 103).

[28] The Federal Court of Appeal has also clarified that this Court must review the RAD's selection of a standard of review on a reasonableness standard (*Huruglica FCA* at para 35). With that in mind, I find that the RAD conducted for Ms. Ketchen, in substance, precisely the kind of

thorough review that Justice Gauthier has endorsed in *Huruglica FCA* – including listening to the complete hearing, reviewing all the exhibits, and rendering a comprehensive judgment dealing with all aspects of the RPD findings.

[29] I also agree with the Respondent that the Applicant has failed to identify a reviewable error and is, in essence, asking that this Court simply reweigh the evidence. The RAD's analysis of numerous points of concern was both detailed and cogent. It was clearly engaged in a correctness analysis throughout the Decision, as prescribed by *Huruglica FCA*, and its conclusions on credibility were well documented and justified – the Applicant's failure to answer basic questions that she should have known as a purported insider of the SCNC were all transparently and intelligibly detailed in the RAD's comprehensive reasons.

C. *Should there have been an oral hearing?*

[30] The Applicant raised this issue for the first time in this judicial review at the hearing. I allowed oral submissions on it only because there was a brief mention of it in the application to the RAD, although nothing was said about it in the representations made to the RAD.

[31] Counsel for the Respondent very ably provided impromptu submissions on this question and I agree entirely with his position, set out with reference to subsections 110(3) and (6):

> (3) Subject to subsections (3.1), (4) and (6), the Refugee Appeal Division must proceed without a hearing, on the basis of the record of the proceedings of the Refugee Protection Division, and may accept documentary evidence and written submissions from the Minister and the person who is the subject of the appeal and, in the case of a matter that is conducted before a panel of three members, written submissions from a representative or agent of the United

> Nations High Commissioner for Refugees and any other person described in the rules of the Board.
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> …
>
> (6) The Refugee Appeal Division may hold a hearing if, in its opinion, there is documentary evidence referred to in subsection (3)
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> (a) that raises a serious issue with respect to the credibility of the person who is the subject of the appeal;
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> (b) that is central to the decision with respect to the refugee protection claim; and
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> (c) that, if accepted, would justify allowing or rejecting the refugee protection claim.

[32] The presumption, according to this regime, is that there will be no oral hearing unless all three criteria under the tripartite test in subsection 110(6) are met as well as the conditions under subsection 110(4) (see *Singh FCA* at para 51: "[t]he new evidence must meet the admissibility criteria set out in subsection 110(4), and a new hearing can be held only if the new evidence fulfils the conditions set out in subsection 110(6)"). However, as explained above, there was no compelling new evidence before the RAD that would meet these criteria. The medical evidence was not admitted and thus is not a consideration under this provision. The only basis for an oral hearing could result from the evidence tendered by the fiancé, and I have already found that the Board was justified in according it low weight, which suggests it could not meet the materiality requirements of subsection 110(6). I find that the RAD's decision to proceed in writing was reasonable.

V. Conclusion

[33] In light of the above, this application for judicial review is dismissed. There are neither any questions certified, nor any costs awarded.

JUDGMENT

THIS COURT'S JUDGMENT is that:

1. The application for judicial review is dismissed;

2. There are no questions to be certified;

3. No costs.

"Alan S. Diner"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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