

Federal Court



Cour fédérale

Date: 20160628

Docket: IMM-5780-15

Citation: 2016 FC 731

Ottawa, Ontario, June 28, 2016

PRESENT: The Honourable Madam Justice Kane

BETWEEN:

**ARIUNAA DEMBEREL AND ENKHJIN
ANKHBAYAR**

Applicants

and

**THE MINISTER OF CITIZENSHIP AND
IMMIGRATION**

Respondent

JUDGMENT AND REASONS

[1] The applicants, Ariunaa Demberel, and her teenage daughter, Enkhjin Ankhbayar, seek judicial review pursuant to section 72 of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [the Act] of the decision of the Refugee Appeal Division [RAD] dated December 1, 2015, which dismissed their appeal of the decision of the Refugee Protection Board [RPD] and confirmed that they are not Convention refugees or persons in need of protection.

[2] The applicants claimed refugee status on the basis of the principal applicant's, Ms. Demberel's, fear of abuse from her ex-husband with whom she had no contact for over fourteen years, until he allegedly resumed his abuse of her. The RAD agreed with the RPD's extensive credibility findings and found that Ms. Demberel was not credible due to inconsistencies, lack of detail, omissions and the improbability of her key allegations.

[3] For the reasons that follow, I find that the RAD's decision is reasonable. The application for judicial review is dismissed.

I. Background

[4] The applicants, citizens of Mongolia, arrived in Canada on July 16, 2014 on Canadian tourist visas. They claimed refugee protection on or around September 8, 2014, based on allegations of abuse by Ms. Demberel's ex-husband.

[5] Ms. Demberel recounts that she married in 1997 and her husband soon became abusive. Ms. Demberel's father learned of the abuse and took the applicants to his home. Ms. Demberel moved to Germany for six months in 2001 to continue her education. In 2003, she moved to the United Kingdom to continue her education and remained there until 2009. Her daughter remained in Mongolia with her parents. Ms. Demberel stated that her father arranged to have her marriage annulled in 2007, although in her testimony it was not clear whether this had occurred. She returned to her parents' home in Mongolia in 2009 and found employment.

[6] Ms. Demberel alleges that following a chance encounter in 2014, her ex-husband's abuse resumed. She recounts threats, forcible confinement, assaults and sexual assaults by her ex-husband over the period from January 30, 2014 to June 11, 2014. Among other incidents, Ms. Demberel recounts that she was held captive at her ex-husband's home from April 15, 2014 to June 11, 2014. She alleges that on June 9, 2014, while still in captivity, her ex-husband became enraged and assaulted her upon learning that Ms. Demberel's boyfriend made a report to the police. Her ex-husband threw a kettle of boiling water on their daughter when she tried to intervene. Ms. Demberel claims that she and her daughter escaped after being permitted by her ex-husband's bodyguard to attend hospital for treatment of her daughter's burns. Ms. Demberel states that her boyfriend then made the arrangements for their Canadian visas.

The RPD decision

[7] The RPD found that Ms. Demberel's account was not credible. Among other things, Ms. Demberel's allegations were not consistent with the statements she made in her visa application and in documents provided in support of that application.

[8] The RPD made numerous adverse credibility findings and found that her allegations of being held captive by her ex-husband were not established. For example, the RPD noted that her personal signature on her visa application, dated June 6, 2014, was inconsistent with her testimony that she was held captive at that time. In her Basis of Claim [BOC] form, she stated that her boyfriend completed the visa applications. However, when confronted with the inconsistency, she responded that she had managed to escape for ninety minutes to submit the

visa application personally. The RPD rejected the explanation, noting it was inconsistent with her BOC and with her boyfriend's affidavit.

[9] The RPD noted the inconsistencies in Ms. Demberel's explanations about how her boyfriend could provide the detailed personal information required for the visas and to obtain a passport for the minor applicant and about her employment records, which indicated that she was on leave for a different period than stated, and that tax remittances were made for her earnings at the time when she was allegedly held in captivity.

[10] The RPD found that Ms. Demberel's allegations were not consistent with the preponderance of probabilities, taking all the information into account. With respect to the most serious allegation, the RPD found that it was highly improbable that her ex-husband, who was described as powerful and financially well-off, would not have found and confronted the applicants before 2014 if he had been determined to find them and control them, as she alleged. The RPD noted that the minor applicant had remained in Mongolia since her birth. The RPD also noted that Ms. Demberel had returned to Mongolia in 2009, had lived and worked there, and had travelled freely without any contact by her ex-husband.

[11] With respect to the applicants' documentary evidence, the RPD found that the medical evidence did not establish the allegations in the BOC; the applicants' injuries were not described and Ms. Demberel's three day stay in hospital was at her own request. The photographs of wounds provided by the applicants did not demonstrate that Ms. Demberel's ex-husband caused the harm. The RPD also found that the post-hearing affidavit submitted by an intake support

person in Mongolia for the National Centre Against Violence appears to have been written to support the applicants' evidence. The RPD further found that the police report indicated that no evidence was found against Ms. Demberel's ex-husband. The RPD also noted that the psychologist's report, which was accepted by the RPD post-hearing, provided an opinion based on the applicants' own statements.

II. The Decision Under Review

[12] The RAD confirmed the decision of the RPD and found that the applicants are not Convention refugees or persons in need of protection.

[13] The applicants submitted new evidence on appeal to the RAD: an unsworn affidavit from Ms. Demberel's boyfriend, dated May 2015, and a sworn affidavit from her former employer, dated June 4, 2015.

[14] The RAD found that the new evidence did not meet the statutory requirements. The applicants had not identified what information in the affidavits was not available at the time of the hearing or why it was not reasonably available. In addition, there was no evidence that the affiants were not available to give this evidence before the RPD.

[15] Due to the uncertainty in the jurisprudence at that time about the application of the factors set out in *Raza v Canada (Minister of Citizenship and Immigration)*, 2007 FCA 385, 289 DLR (4th) 675 [*Raza*] to the admission of new evidence pursuant to subsection 110(4), the RAD also considered whether the exclusion of the new evidence would hinder a full fact-based appeal.

[16] The RAD questioned the credibility of both documents. The employer's affidavit was on plain paper, unlike a previous document from the same employer, and the RAD questioned whether it had been properly sworn. Ms. Demberel's boyfriend was not an impartial witness and his affidavit sought to bolster evidence that the RPD had found to be not credible. It also included new information that would have been relevant before the RPD.

[17] The RAD found that due to the low probative value in the documents, their exclusion would not hinder a full, fact-based appeal.

[18] With respect to the RPD's decision, the RAD noted that it could respect the RPD's findings on credibility, noting that the RPD enjoyed a particular advantage and was in the best position to make credibility findings, as the applicants appeared before the RPD and answered questions. The RAD added that it also conducted its own assessment of the applicants' credibility based on a review of the record.

[19] The RAD disagreed with the applicants' submission that the RPD erred in making a finding that it was implausible that Ms. Demberel's ex-husband would target her after fourteen years of no contact. The RAD found that this was not a finding of implausibility; rather, the RPD had found that it was improbable that her ex-husband continued to pursue the applicants throughout Mongolia, as she alleged.

[20] Based on its independent assessment of the evidence, the RAD agreed with the negative credibility findings of the RPD, noting that the RPD was correct to be suspicious of Ms.

Demberel's account, given that several relevant facts arose for the first time in her testimony and only in response to inconsistencies identified by the Minister.

[21] The RAD commented that the applicants "faced some sort of trauma as evidenced by the psychological report and their attendance at the National Centre Against Violence" but concluded that the cause of the trauma has not been established by reliable and credible evidence. The RAD concluded, based on its own review of the evidence, that there was no sufficient credible, objective basis to find the applicants to be Convention refugees or persons in need of protection.

III. The Issues

[22] The applicants argued that the RAD's decision is not reasonable because:

- The RAD erred by rejecting the new evidence;
- The RAD erred by not recognizing the RPD's key finding to be one of plausibility, which was not reasonable because it was based on speculation; and,
- The RAD's decision is unintelligible; the RAD accepted that the applicants had suffered trauma based on the evidence, which corroborates their account of abuse and which should have been considered in the assessment of the applicants' well-founded fear of persecution.

IV. Standard of Review

[23] The RAD conducts an appeal of the RPD's decision. The Court conducts a judicial review of the RAD's decision.

[24] In the recent decision *Canada (Minister of Citizenship and Immigration) v Huruglica*, 2016 FCA 93 at para 103, [2016] FCJ No 313 (QL) [*Huruglica FCA*], Justice Gauthier clarified that the RAD should fulfill its appellate role and apply the standard of correctness when reviewing an RPD decision.

[25] With respect to deference owed to the RPD's credibility findings, Justice Gauthier described several scenarios at paras 69-74 to highlight the situations where the RAD should consider deference to the RPD and, alternatively, where the RAD should be cautious in substituting its decision, noting that the RAD would develop its own jurisprudence over time.

[26] Justice Gauthier noted at para 70, that with respect to whether deference is owed to the RPD: "In each case, the RAD ought to determine whether the RPD truly benefited from an advantageous position, and if so, whether the RAD can nevertheless make a final decision in respect of the refugee claim."

[27] As the parties agree, although the RAD decision preceded the decision in *Huruglica FCA*, the requirement for an independent assessment of the evidence does not differ from the

guidance of the Federal Court, which the RAD applied. Moreover, the standard of review is not determinative of the issues in this judicial review.

[28] The Court reviews the RAD's determinations of factual issues, including credibility, and issues of mixed fact and law on the reasonableness standard. This includes determinations regarding the admissibility of new evidence (*Canada (Minister of Citizenship and Immigration) v Singh*, 2016 FCA 96 at para 29, [2016] FCJ No 315 (QL) [*Singh FCA*]).

[29] The reasonableness standard focuses on "the existence of justification, transparency and intelligibility within the decision-making process" and considers "whether the decision 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 at para 47, [2008] 1 SCR 190).

V. The RAD did not err in rejecting the new evidence

[30] The RAD reviewed the new evidence and reasonably found that it was not admissible.

[31] *Singh v Canada (Minister of Citizenship and Immigration)*, 2014 FC 1022, [2015] 3 FCR 587, relied on by the applicants, did not endorse flexibility in the admission of new evidence to the exclusion of the statutory criteria. Moreover, the Federal Court of Appeal in *Singh FCA* has established that the statutory criteria are clear that a restrictive approach to new evidence is reflected in the criteria and the RAD does not have discretion to ignore the criteria.

[32] The RAD's analysis was consistent with *Singh FCA*, which provides that new evidence must meet the requirements of subsection 110(4) and that the "RAD always has the freedom to apply the conditions of subsection 110(4) with more or less flexibility depending on the circumstances of the case" (at para 64).

[33] The RAD focussed first on the statutory requirements of subsection 110(4) and reasonably found that the applicants had not provided a reasonable, or any, explanation why the new evidence was either not available to them at the RPD or why they were prevented from providing it.

[34] Despite the rejection of the evidence based on the statutory criteria, the RAD went on to consider the two affidavits and found that they were not credible and provided reasons for this finding.

VI. The RAD did not err in deferring to the RPD's credibility findings and/or plausibility findings

[35] The applicants argue that the RAD erred in not recognising the RPD's erroneous implausibility finding which was based on speculation. I do not agree.

[36] The RAD found that the RPD did not make an implausibility finding. The RAD noted that the RPD found that the central allegation, that Ms. Demberel's ex-husband had continued to search for the applicants throughout Mongolia, was improbable. The RAD found that this finding was reasonably based on the RPD's evaluation of the evidence.

[37] The RPD's finding, that Ms. Demberel's ex-husband had the means and ample opportunity long before 2014 to track her down or to find their daughter if he were the powerful, affluent man she described and had been intent on resuming his control and abuse, is supported by the evidence. Ms. Demberel lived abroad in the UK and Germany for many years, with her daughter remaining in Mongolia without incident. Ms. Demberel had returned and lived in Mongolia from 2009 to 2014, also without incident, and had travelled freely.

[38] This finding was based on what could reasonably be expected. The RPD could have characterized this as a finding of implausibility, but instead referred to the account as both improbable and highly improbable. Regardless, it is a reasonable finding based on the evidence.

[39] It was not speculative reasoning to find that it was improbable, or even implausible, if such a finding had been made, that Ms. Demberel's husband would resume his abuse after a period of no contact for over fourteen years.

[40] In *Zacarias v Canada (Minister of Citizenship and Immigration)*, 2012 FC 1155, [2012] FCJ No 1252 (QL) [*Zacarias*], Justice Gleason reviewed the jurisprudence on plausibility and related credibility findings and noted:

11. An allegation may thus be found to be implausible when it does not make sense in light of the evidence before the Board or when (to borrow the language of Justice Muldoon in *Vatchev*) it is "outside the realm of what reasonably could be expected". In addition, this Court has held that the Board should provide "a reliable and verifiable evidentiary base against which the plausibility of the Applicants' evidence might be judged", otherwise a plausibility determination may be nothing more than "unfounded speculation" (*Gjelaj v Canada (Minister of Citizenship and Immigration)*, 2010 FC 37 at para 4, [2010] FCJ No 31; see

also *Cao v Canada (Minister of Citizenship and Immigration)*,
2012 FC 694 at para 20, [2012] FCJ No 885 [Cao]).

[41] The RAD reasonably deferred to the RPD's finding based on the RPD's advantage in hearing the testimony and on its own independent assessment of the evidence. The RAD agreed that the allegations regarding Ms. Demberel's account of being held captive by her ex-husband and her claims that he had searched for the applicants and would continue to do so upon their return did not make sense in light of the contradictions and inconsistencies in her allegations of abuse and her testimony.

[42] In my view, whether the RPD made a plausibility finding or a credibility finding makes no difference, as the finding relates to Ms. Demberel's credibility, which the RAD found had been thoroughly assessed by the RPD and found to be lacking. The RAD reached the same conclusion based on its own assessment. The finding was reasonable and well supported by the evidence.

VII. The RAD's decision is reasonable; it is intelligible, transparent and justified

[43] In the oral submissions the applicants focussed on the argument that the RAD erred in its treatment of the documentary evidence, in particular the psychologist's report and the affidavit of the intake worker at the National Centre Against Domestic Violence.

[44] The applicants submit that the RAD was required to independently assess this evidence which corroborates their account of abuse, as there is no other explanation for the trauma they

suffered. The applicants argue that the RAD erred in not finding that this independent assessment supports a well-founded fear of persecution. I do not agree.

[45] The applicants focus on one paragraph in the RAD's 83 paragraph decision to argue the finding is unintelligible and the decision unreasonable. The paragraph in question follows the RAD's conclusion that it agreed with the extensive negative credibility findings of the RPD. The RAD noted that the applicants faced some trauma "as evidenced by the psychological report and their attendance at the National Centre Against Violence." The RAD then added that the cause of the trauma has not been established by reliable and credible evidence. Based on the RAD's own independent assessment of the evidence – all the evidence – the RAD agreed with the finding of the RPD that there was no sufficient, credible or objective basis for the applicants' claims.

[46] There is nothing confusing, unintelligible or unreasonable in the RAD's finding regarding the two documents. The RAD was entitled to accept that the applicants suffered some type of trauma without accepting that the cause of that trauma was the alleged abuse by Ms. Demberel's ex-husband. Both the psychologist's report and the affidavit from the Centre are based on the account provided by Ms. Demberel, which the RPD and the RAD reasonably found to be not credible.

[47] The jurisprudence has cautioned that the recounting of events to a psychologist or a psychiatrist does not make these events more credible and that an expert report cannot confirm allegations of abuse. For example, in *Rokni v Canada (Minister of Citizenship and Immigration)*, [1995] FCJ No 182 (QL) at para 16, 53 ACWS (3d) 371 (FCTD) and *Danailov v Canada*

(*Minister of Employment and Immigration*), [1993] FCJ No 1019 (QL) at para 2, 44 ACWS (3d) 766 (FCTD), the Court noted that such reports cannot possibly serve as a cure-all for deficiencies in a claimant's testimony and that opinion evidence is only as valid as the truth of the facts upon which it is based. The same caution was noted by Justice Phelan in *Saha v Canada (Minister of Citizenship and Immigration)*, 2009 FC 304 at para 16, 176 ACWS (3d) 499:

It is within the RPD's mandate to discount psychological evidence when the doctor merely regurgitates what the patient says are the reasons for his stress and then reaches a medical conclusion that the patient suffers stress because of those reasons.

[48] In *Czesak v Canada (Minister of Citizenship and Immigration)*, 2013 FC 1149 at paras 37-40, 235 ACWS (3d) 1054, Justice Annis noted concerns about psychological reports that advocate in the guise of an opinion and "propose to settle important issues to be decided by the tribunal." Justice Annis found that in such cases, without some way to probe the opinion, little weight should be attached to it.

[49] Similarly, in *Egbesola v Canada (Minister of Citizenship and Immigration)*, 2016 FC 204, [2016] FCJ No 204 [*Egbesola*], Justice Zinn addressed arguments that the report of a psychologist had not been considered. Justice Zinn noted at para 12:

12. As submitted by the respondent, the "facts" on which the report is based are those told to Dr. Devins by the principal applicant, and thus are not facts until found to be so by the tribunal. What can be reasonably taken from the report is that the principal applicant suffers from PTSD, and that she requires medical treatment for it.

[50] As in *Egbesola*, all that can be taken from the two documents is that the applicants suffered trauma. The RAD did not fail to independently assess this evidence, but was obviously

well aware of the jurisprudence noted above. The RAD made a clear and intelligible finding that although there was evidence that the applicants had suffered trauma, the cause of that trauma had not been established by reliable and credible evidence.

JUDGMENT

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

There is no question for certification.

"Catherine M. Kane"

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: IMM-5780-15

STYLE OF CAUSE: ARIUNAA DEMBEREL AND ENKHJIN ANKHBAYAR
v THE MINISTER OF CITIZENSHIP AND
IMMIGRATION

PLACE OF HEARING: CALGARY, ALBERTA

DATE OF HEARING: JUNE 14, 2016

**REASONS FOR JUDGMENT
AND JUDGMENT:** KANE J.

DATED: JUNE 28, 2016

APPEARANCES:

Ram Sankaran

FOR THE APPLICANTS
ARIUNAA DEMBEREL AND ENKHJIN
ANKHBAYAR

Galina Bining

FOR THE RESPONDENT
THE MINISTER OF CITIZENSHIP AND
IMMIGRATION

SOLICITORS OF RECORD:

Ram Sankaran

FOR THE APPLICANTS

Barrister and Solicitor

ARIUNAA DEMBEREL AND ENKHJIN

Calgary, Alberta

ANKHBAYAR

William F. Pentney

FOR THE RESPONDENT

Deputy Attorney General of

THE MINISTER OF CITIZENSHIP AND

Canada

IMMIGRATION

Calgary, Alberta