

Federal Court



Cour fédérale

Date: 20170223

Docket: IMM-3259-16

Citation: 2017 FC 218

Toronto, Ontario, February 23, 2017

PRESENT: The Honourable Madam Justice Simpson

BETWEEN:

MARIIA ABAKUMOVA

Applicant

and

**THE MINISTER OF IMMIGRATION,
REFUGEES AND CITIZENSHIP**

Respondent

JUDGMENT AND REASONS

[1] The Applicant has applied for judicial review of a decision [the Decision] of the Refugee Appeal Division [RAD] dated July 11, 2016, confirming the Refugee Protection Division's [RPD] finding that she is neither a *Convention* refugee nor a person in need of protection. This application is brought pursuant to subsection 72(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [the IRPA].

I. Background

[2] The Applicant is a 77 year old citizen of the Ukraine who states that she faces persecution due to her Russian ethnicity.

[3] The Applicant claims that in 2014, the Russian/Ukrainian conflict started to affect her directly through a series of incidents involving her neighbor, Nokolay Doroch [Doroch], who is alleged to be a member of a nationalist group called the “Cleaners”. Its aim is to rid the Ukraine of Russians. The Applicant alleges that she suffered multiple assaults and threats between May and December 2014. The allegations are as follows:

[4] On May 1, 2014, Doroch assaulted the Applicant in her building lobby and told her to leave Ukraine and go to Russia.

[5] On May 9, 2014, Doroch assaulted her while she took out her garbage. The police were called but, being drunk, they simply told the Applicant to return home.

[6] On May 9, 2014, the Applicant went to the police station to explain what had occurred, but the police officer refused to take her report.

[7] On May 13, 2014, the Applicant returned to the police station and successfully filed a complaint. When she returned to her apartment, she found her door covered in feces and Doroch told her that his brother, who is a police officer, knew about her complaint, and that it would disappear.

[8] On May 27, 2014, Doroch verbally threatened the Applicant as she was coming back from the grocery store.

[9] On June 20, 2014, when she was returning from a doctor's appointment, Doroch and his friends again assaulted and threatened the Applicant. After the assault, the Applicant attended a walk-in clinic and the doctor called the police to report the assault.

[10] On July 1, 2014, Doroch's brother kicked in the Applicant's door and stated that he was aware of her visit to the walk-in clinic.

[11] On August 4, 2014, Doroch again assaulted and threatened the Applicant. An ambulance was called and she spent a week in hospital.

[12] After her release from the hospital, she stayed with a friend for two months.

[13] In October 2014, when she returned to her apartment to get warmer clothes, she found her door unlocked and her window broken. The words "Russian bitch go home" were painted on her wall. She was again assaulted and threatened by Doroch. A neighbour called an ambulance and the Applicant was hospitalized for three days.

[14] When she was discharged, the Applicant moved into another friend's shed but, in December 2014, someone threw a rock through her friend's window with an attached note

threatening continued vandalism as long as “you hide a Russian bitch”. The neighbor went to the police but, since no one observed the incident, nothing was done.

[15] At this point that the Applicant called her daughter and arrangements were made for her to come to Canada. On July 13, 2015, she was issued a visitor’s visa. The Applicant left the Ukraine on August 14, 2015. She filed her Basis of Claim [BOC] form on October 28, 2015.

II. RPD Decision

[16] Credibility was the determinative issue. The RPD found that despite her age, the Applicant was sophisticated, articulate, and able to recall very detailed information. For this reason her age was not found to excuse the contradictions and omissions in her testimony. Furthermore, her vision and hearing impairments failed to explain the credibility concerns. The RPD considered her evidence on four topics and found that it undermined her credibility.

[17] First, regarding the May 9, 2015 incident in which she was attacked by Doroch, the Applicant testified at the hearing that she went to the doctor two or three days after the incident. However, the Applicant did not include this fact in her BOC.

[18] Second, she stated in her BOC that Doroch’s brother, named Micael Doroch, was a policeman. At the hearing, the Applicant testified she was unsure about his name, and stated that he was Doroch’s cousin rather than his brother. Asked to explain this inconsistency, the Applicant stated that she really did not know him and that she had never seen him. However, this response was inconsistent with her BOC, which states that she saw him kick in her door on July

1, 2014 and with her evidence that she dealt with him when she went to the police station to report on May 9, 2014. Further pressed about these inconsistencies, the Applicant became agitated and stated that she did not know anything.

[19] Third, her BOC states that on June 23, 2014 she sought medical attention for injuries caused by Doroch, a fact corroborated by a medical certificate dated July 23, 2014. However, at the hearing, she stated that she did not seek medical attention after this assault. She did not provide a reasonable explanation for these two different accounts or for why she said the attack took place in June instead of July when she went for treatment.

[20] Finally, the RPD had concerns regarding a police statement from “Inspector Tereshenko” [the Statement]. The Statement is not dated, does not indicate name a police station or militia, and does not indicate the Inspector’s badge number or have any other identifying features. Furthermore, the RPD said that, while the Statement says that the Applicant appealed to his department on both May 9, 2014 and December 9, 2014, her BOC and testimony state that she reported to the station in Kharkov in May and a station twenty minutes outside of Kharkov in December. Furthermore, as the Applicant claims to have spoken to Doroch’s brother when she went to police on May 9, 2014 and says that he did not take a report, it is unclear how Inspector Tereshenko would have been aware of the May 9 report or what Doroch said during the assault. After citing these concerns, the RPD noted that according to the documentary evidence, police certificates are easily forged in the Ukraine. In my view, this was tantamount to a conclusion that the Statement was fraudulent.

III. RAD Decision

[21] The RAD confirmed the RPD's decision and dismissed the appeal. It found that the RPD was clear in its credibility findings, that there were a number of such findings, and that some of them concerned material aspects of the Applicant's allegations.

[22] The RAD considered two pieces of new evidence filed pursuant to Rule 29 of the RAD Rules: a psychiatrist's report from Dr. Richard J. Stall, dated April 14, 2016, indicating that the Applicant suffers from Post-Traumatic Stress Disorder (PTSD); and an affidavit dated April 15, 2016 from Valentina Nikolenko, the Applicant's friend and neighbor [the Affidavit]. She attached pictures of the Applicant's apartment door, on which messages from Doroch are visible. The photos were taken between March 13th and 18th, 2016. Dr. Stall's report was accepted but the Affidavit was refused as new evidence. The RAD also said that even if the Affidavit had been accepted, the photographs would not have overcome its credibility concerns.

[23] The RAD concluded that Dr. Stall's report could not overcome the RPD's credibility findings because it did not mention memory or concentration problems.

[24] The RAD concurred with the RPD's analysis of the Applicant's failure to mention in her BOC narrative that she sought medical attention after the May 9, 2015 incident. It found that this omission was material because since she had ample time to prepare her BOC, the omission was not explained by her evidence that she experienced memory problems.

[25] The RAD addressed the RPD's analysis of the contradictions, inconsistencies and omissions in the Applicant's evidence about the person alleged to be Doroch's brother. The

Applicant had argued that this analysis had been microscopic in that, in the Ukraine, all close relatives are referred to as “brothers”. The RAD agreed with the Applicant, finding that in the Ukraine, the words “brother” and “cousin” are interchangeable. However, the RAD nevertheless found that the testimony about Doroch’s “brother” was inconsistent and contradictory.

[26] The RAD also agreed with the RPD that the contradictory evidence surrounding the Applicant’s medical visit on June 23, 2014 impugned her credibility. The RAD concluded that the one month disparity between the date of medical examination claimed in the Applicant’s BOC and testimony (June) and the date stated on the medical certificate (July) either called into question the contents of the Applicant’s BOC or the validity of the medical certificate.

[27] Finally after listening to the audio recording of the RPD hearing, the RAD concluded that either the Statement was not genuine or the Applicant’s testimony was not credible. Either way, the Applicant’s credibility was impugned.

IV. The Issues

1. Were the credibility findings reasonable?
2. Should the Affidavit have been accepted as new evidence?
3. Should a hearing have been ordered?
4. Was it unreasonable to have given Dr. Stall’s report “little weight”?
5. Was it contrary to the principles of natural justice for the RAD to take the original of the Statement for analysis without giving the Applicant or her counsel an opportunity to address the RAD’s concerns?

A. *Issue 1*

(1) The Statement

[28] The RAD agreed with the RPD that the Statement by Inspector Tereshenko was possibly fraudulent. The following reasons were given by the RPD and accepted by the RAD:

- A. it was undated;
- B. the militia was not identified;
- C. the Inspector did not provide his badge number;
- D. the document had no identifying features;
- E. the Applicant alleged that she spoke to an Officer on May 9 who refused to take a report. It was therefore unclear how the Inspector knew what Doroch said during the May 9 attack;
- F. the Statement says that the Applicant made a report on May 9, yet the Applicant testified that no report was taken that day;
- G. The Applicant's BOC and testimony said she reported in May to a police station in Kharkov and in December to a station 20 minutes outside Kharkov. However, the Statement says she appealed to the Inspector's department in both May and December.

[29] In my view, the finding that this document was possibly fraudulent was unreasonable because points D to G are based on the following errors of fact:

- Re point D: The Statement did have some identifying features. It was signed, was on letterhead and bore an insignia.

- Re point E: The RPD and the RAD misread the Statement. It clearly says that the Applicant reported the events of May 9 to the Inspector's department on May 13. That is how the Inspector knew of the attack and how he could quote Doroch's words.
- Re point F: the RPD and the RAD misread the Statement. It does not say that a report was made on May 9, 2014.
- Re point G: The Statement does not describe the militia department. It simply says the Applicant appealed to it on two dates. No locations are mentioned in the Statement. The department may be an office, or it may be a police group with more than one office. It is not inconceivable that members of the same police department would serve in offices located 20 minutes apart. The conclusion that the Statement is inconsistent with her testimony and BOC is therefore unreasonable.

[30] In my view this finding had a powerful impact on the Decision. It justified a failure to consider the Applicant's further medical reports of August 4 and October 4, 2014 – both of them mentioned concussions - and it meant that the RPD and the RAD did not sympathize with the Applicant's explanations that she was having difficulty with her memory.

[31] There was also an error on a second topic. On May 9, 2014, the Applicant was struck in her eye by Doroch, and at the hearing she said that she went to the doctor two or three days later. The RPD correctly noted that this was not mentioned in her BOC and found it to be a "material" omission. The RAD agreed. However, the RAD did not notice that the RPD failed to refer to her

medical report of May 12, 2014, which shows that she was treated for damage to her eye.

Accordingly, while it is true that she left the doctor's visit out of her BOC, it was unreasonable to conclude, in view of the medical report, that the error was material.

[32] There is no question that there were inconsistencies in the Applicant's presentation but, in my view, the errors made by the RPD and the RAD in their assessment of the Statement were so fundamental that they tainted the RAD's approach to the evidence as a whole.

[33] For these reasons, the application will be granted.

[34] As this issue is dispositive, it is not necessary to deal with the other issues.

V. Certification

[35] No questions were posed for certification for appeal.

JUDGMENT

THIS COURT'S JUDGMENT is that the application is allowed and the Applicant's appeal is to be reconsidered by a different member of the RAD.

"Sandra J. Simpson"

Judge

FEDERAL COURT
SOLICITORS OF RECORD

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