

Federal Court



Cour fédérale

Date: 20180517

Docket: IMM-4477-17

Citation: 2018 FC 521

[ENGLISH TRANSLATION]

Montréal, Quebec, May 17, 2018

PRESENT: The Honourable Mr. Justice Shore

BETWEEN:

SOMAIRA ALTAGRACIA FERMIN MORA

Applicant

and

**THE MINISTER OF CITIZENSHIP
AND IMMIGRATION**

Respondent

JUDGMENT AND REASONS

I. Nature of the matter

[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 (Board) made on September 28, 2017, under subsection 111(1) of the IRPA. In that decision, the RAD confirmed the decision of the Refugee

Protection Division (RPD) finding that the applicant is not a “Convention refugee” or “person in need of protection” within the meaning of sections 96 and 97 of the IRPA.

II. Facts

[2] The applicant, age 48, is a citizen of the Dominican Republic.

[3] The applicant claims that if she were to return to her country, she would fear for her life and mistreatment by her ex-husband, Miguel Fernandez. The applicant married Miguel in April 1994 and had three children with him. The couple divorced on October 20, 2014.

[4] In the narrative attached to the Basis of Claim (BOC) Form, the applicant writes that her ex-husband is unstable, irresponsible and aggressive. According to the applicant, since her ex-husband was not changing his behaviour and was continuing to drink alcohol and steal her money, she decided to leave the family home with her three children on August 8, 2011. The applicant’s brother allowed the applicant and her children to stay at his home.

[5] The applicant says that in December 2011 she and her children went to live with her mother, but her children returned to live with their father [TRANSLATION] “where they were more comfortable.”

[6] The applicant states that on the night of January 20 to 21, 2013, her daughter told her not to return to her mother’s home because her ex-husband was waiting there to kill her with a machete. The applicant says that she had been at her aunt’s home to celebrate her leaving for the

United States. She stayed at her aunt's home for the night, since it was late. The applicant claims that her ex-husband is a jealous man and that he suspected that she was with another man while she was spending time with her aunt.

[7] On January 22, 2013, the applicant reportedly filed a complaint with the Bureau de la violence intrafamiliale de genre et sexuelle [bureau of domestic, sexual and gender-based violence] to report her ex-husband's threats.

[8] The applicant claims that the next day, she stayed with her sister's in-laws to prevent her ex-husband from finding her. Mr. Fernandez nevertheless tried to go to the applicant's workplace, but he was unable to enter because of security measures in place.

[9] In December 2013, the applicant's visa application for the United States was denied. In April 2014, the applicant obtained a visa for Canada and arrived here in May 2014.

[10] In 2014 and 2015, the applicant applied to change the conditions of her stay in order to visit her spouse in Montréal.

[11] On February 2, 2016, the applicant filed a claim for refugee protection in Canada.

III. The RPD's decision

[12] On May 26, 2016, the RPD refused the applicant's claim for refugee protection on the grounds that she was not a refugee within the meaning of the United Nations' *Convention relating to the Status of Refugees* or a person in need of protection.

[13] The RPD's decision was based solely on the finding that the applicant was not credible, her identity having been established to the panel's satisfaction. In general, the RPD member found that the applicant presented a [TRANSLATION] "rather vague" testimony. Among other things, the applicant was unable to provide details on her divorce. The panel concluded that these inconsistencies were major problems that influenced her credibility. The RPD found that the applicant's testimony was not credible on the basis of several elements in her refugee claim, namely:

- i. contradictions between the applicant's testimony and the narrative attached to the BOC regarding the incident on January 20, 2013;
- ii. contradiction between the applicant's testimony and the police report dated January 22, 2013, describing the circumstances of the incident on January 20, 2013;
- iii. contradictions on the locations where her children and ex-husband resided;
- iv. failure to mention in her narrative attached to the BOC that the police had given her a restraining order following the complaint she filed on January 22, 2013.

[14] Lastly, the RPD refused the applicant's refugee claim because of her behaviour. The panel observed that the applicant had waited a long time following the incident in January 2013

before leaving her country in May 2014. The panel found that the applicant had not taken enough steps to try to escape from her ex-husband. Moreover, the panel noted that the applicant did not appear to seek help from authorities to report the situation, with the exception of January 22, 2013. According to the RPD, this behaviour was inconsistent with that of someone who claims to fear for her safety. The panel also noted that the applicant had said that her ex-husband would often come to her mother's home to try to find her. The RPD did not accept the applicant's explanations when confronted with these points on the grounds that it was unreasonable to wait until February 2016 to file a claim for refugee protection in Canada.

[15] On June 21, 2016, the applicant filed an appeal of the RPD's decision.

IV. The RAD's decision

[16] On September 28, 2017, the RAD dismissed the applicant's appeal and upheld the RPD's decision pursuant to subsection 111(1) of the IRPA.

[17] Firstly, the RAD found that the applicant had presented no new evidence and that there was no need to hold a hearing. It then listed the RPD's findings on credibility. After setting out the applicant's arguments taken from her Memorandum of Appeal, the RAD specified its role as an appeal tribunal.

[18] Following a thorough independent assessment of the record and the RPD's findings, the RAD concluded that the RPD did not err in its evaluation of the evidence and of the applicant's explanations. After listening to the recording of the hearing, the RAD member also came to the

conclusion that the applicant was not credible in key elements of her testimony. For example, the member noted that there were significant contradictions between the report to the authorities about the incident and the applicant's BOC. The RAD was of the opinion that the applicant had given different versions of the incident that reportedly occurred with her ex-husband. The RAD conducted an independent analysis of the evidence and drew a negative inference with regard to credibility.

V. Issue

[19] The sole issue is to determine whether the RAD's decision is reasonable.

[20] The RAD's factual findings and its assessment of the evidence are questions of mixed fact and law and are reviewed on a standard of reasonableness (*Abbar v. Canada (Citizenship and Immigration)*, 2017 FC 1101 at para 21; *Akuffo v. Canada (Citizenship and Immigration)*, 2014 FC 1063 at para 27 [*Akuffo*]; *Siliya v. Canada (Citizenship and Immigration)*, 2015 FC 120 at para 20). To intervene, the Court must be convinced that the RAD's decision does not fall "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), considering the RAD's considerable expertise in deciding appeals.

VI. Relevant provisions

[21] The following provisions from the IRPA are relevant:

Convention refugee

96. A Convention refugee is a

Définition de « réfugié »

96. A qualité de réfugié au

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,

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) 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

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) 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.

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.

Person in need of protection

Personne à protéger

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

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) to a danger, believed on substantial grounds to exist, of torture within the meaning of Article 1 of the Convention Against Torture; or

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 Convention contre la torture;

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

b) soit à une menace à sa vie ou au risque de traitements ou peines cruels et inusités dans

le cas suivant :

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

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

(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,

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

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

(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 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.

(2) A également qualifié 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.

Decision

111 (1) After considering the appeal, the Refugee Appeal Division shall make one of the following decisions:

Décision

111 (1) La Section d'appel des réfugiés confirme la décision attaquée, casse la décision et y substitue la décision qui aurait dû être rendue ou renvoie, conformément à ses instructions, l'affaire à la Section de la protection des réfugiés.

(a) confirm the determination of the Refugee Protection Division;

(b) set aside the determination and substitute a determination that, in its opinion, should have been made; or

(c) refer the matter to the Refugee Protection Division for re-determination, giving the directions to the Refugee Protection Division that it considers appropriate.

VII. Positions of the parties

[22] The applicant argues that the RAD did not conduct an independent assessment to arrive at their findings on her credibility. In its reasons for decision, the RAD apparently reiterated the RPD's conclusions on the basis of which it dismissed the appeal, even though it had access to the full recording of the hearing in the Appeal Record. The applicant argues that the RAD was obligated to consider the evidence before it instead of elements secondary to the refugee claim. For example, she contends that the RAD erred in considering only secondary factors (wrong address of her ex-husband, presence of children at the applicant's residence the night of the incident on January 20, 2013, etc.) to conclude that her testimony is not credible. Consequently, the RAD apparently erred by performing a microscopic analysis of the applicant's testimony, focusing on peripheral elements (*Attakora v. Canada (Minister of Employment and Immigration)*, [1989] FCJ No 444).

[23] The applicant then argues that “a claimant’s testimony is presumed to be true unless there are valid reasons to doubt its truthfulness [*Maldonado v. Canada (MCI)*, [1980] 2 FC 302]” (Applicant’s Record, Memorandum, at page 26).

[24] The applicant argues that the RAD should have set aside the RPD’s decision after finding that the RPD erred in speculating on the last time the applicant and her ex-husband would have met to sign their divorce papers. The applicant also argues that it was not founded on evidence to state that the notary’s document is [TRANSLATION] “apocryphal,” since nothing in the evidence on record would result in doubt about the document’s authenticity.

[25] According to the applicant, the RAD failed to consider her profile, that is, her age, culture and social experience (*Cooper v. Canada (Citizenship and Immigration)*, 2012 FC 118 at para 4). In her view, these omissions are sufficient to render the decision unreasonable.

[26] The applicant argues that the RAD did not address the RPD’s finding that she waited nearly 21 months once she was in Canada to make a claim for protection.

[27] The respondent maintains that the RAD’s decision is reasonable. Contrary to the applicant’s arguments, the respondent is convinced that the RAD conducted an independent assessment of the evidence on file. The respondent does not find that the RAD reiterated the same conclusions and inconsistencies as the RPD to render its decision. The Minister contends that the RAD did perform an independent analysis of the evidence, since it even drew a negative

inference on one of the RPD's findings about the notary's document. The respondent points out that the Court must show deference to the findings made by the RAD:

The Court must avoid substituting its own interpretation of the facts for that of the RAD—an administrative tribunal that specializes in appeals—and must show deference to the RAD's findings, especially since they confirm the findings made by the RPD, whose mandate and expertise centre on assessing refugee claimants' testimonies and credibility (*Canada (Citizenship and Immigration) v. Khosa*, 2009 SCC 12, at para 89, [2009] 1 SCR 339; *Quintero Sanchez v. Canada (Citizenship and Immigration)*, 2011 FC 491, at para 12; *Touileb Ousmer v. Canada (Citizenship and Immigration)*, 2012 FC 222, at para 15; *Cepeda-Gutierrez v. Canada (Minister of Citizenship and Immigration)*, [1998] FCJ No 1425, at para 14, 157 FTR).

(*Koita v. Canada (Citizenship and Immigration)*, 2016 FC 774 at para 7.)

[28] Contrary to the applicant's arguments, the respondent is convinced that the RAD did not take a microscopic approach to making its decision. The respondent also states that the applicant made this same argument in her Memorandum of Appeal against the RPD. The RAD considered that argument and found that the RPD did not err on this point.

[29] The respondent is not of the opinion that the RAD found that the divorce document was apocryphal. The respondent argues that the RAD noted in its decision that the RPD erred in having speculated on an aspect of the evidence. It then added the example of an apocryphal document solely to explain how the RPD erred in assessing that evidence.

[30] The respondent argues that the presumption of truthfulness regarding the applicant's testimony is not absolute, but is unchallengeable. [TRANSLATION] "Her lack of credibility sufficed to rebut it" (Respondent's Memorandum, at para 25). The respondent also disagrees that

the RAD was obligated to consider the applicant's profile. The applicant did not provide explanations in her Memorandum of Appeal on the obligation to consider the personal and cultural aspects of her profile.

VIII. Analysis

[31] For the reasons that follow, this application for judicial review is dismissed.

A. *Is the RAD's decision reasonable?*

[32] For the reasons that follow, the Court agrees with the respondent's position.

[33] [TRANSLATION] "The RPD's decision is based entirely on credibility" (RAD Reasons and Decision, at para 31).

[34] The RAD's reasons clearly show that it conducted an independent assessment of the evidence.

It is clear from the RAD's reasons that it did not simply confirm the RPD's findings without qualification. Rather, it relied on a thorough examination of the record and on the parties' submissions to confirm the RPD's credibility findings, resulting in the dismissal of the appeal.

(Hamidi v. Canada (Citizenship and Immigration), 2015 FC 243 at para 23 [Hamidi].)

[35] The Court is convinced that the RAD considered all of the evidence, including the applicant's recorded testimony before the RPD. The RAD also considered the RPD's negative

findings on credibility. Contrary to the applicant's claims, "[t]he fact that the RAD made the same findings as the RPD does not mean that no independent analysis was done" (*Paye v. Canada (Citizenship and Immigration)*, 2017 FC 685 at para 18). In performing its own analysis of the evidence on file, the RAD did not retain all of the RPD's findings and made a decision on each of the reasons for appeal. For example, it accepted one of the applicant's arguments in her Memorandum of Appeal, namely that:

[TRANSLATION] The RPD erred in stating that it believed the ex-spouses saw one another again after their separation to finalize their divorce. The appellant thinks that is pure speculation.

(RAD Reasons and Decision, at para 41).

[36] Thus, the RAD explained in its reasons that [TRANSLATION] "the RPD's finding that the notary made an error appears to be speculative" (RAD Reasons and Decision, at para 42). Considering all of the evidence, the Court finds that the RAD was not convinced that the RPD's error was determinative to set aside its decision, and that the RAD's reasons could not be more clear and explicit on the rejection of the RPD's finding: [TRANSLATION] "However, in the RAD's view, this element in itself has no bearing on the RPD's overall decision. This is an element of little importance among all of the evidence" (RAD Reasons and Decision, at para 43). The Court finds that it was reasonable for the RAD to draw a negative inference about credibility, in light of all of the evidence (*Sanmugalingam v. Canada (Citizenship and Immigration)*, 2016 FC 200 at para 81).

[37] The Court also acknowledges that the RAD did not err in the explanations it gave with regard to the divorce papers. The Court agrees with the respondent's argument that the RAD only enhanced its analysis by providing the example of an apocryphal document. The Court is

convinced that the RAD's reasons do not lead to confusion because, after giving the example of an apocryphal document, the RAD clearly indicated that [TRANSLATION] "the evidence is insufficient to draw any conclusions" (RAD Reasons and Decision, at para 42).

[38] "The Court finds that it was reasonable for the RAD to show some deference to the RPD's credibility findings; the RPD has the considerable advantage of hearing the testimony in person and weighing the credibility and probative value of the evidence presented by the parties" (*Hamidi*, above, at para 24). The RAD also acknowledged the limitations of its role as an appeal tribunal, which is why, from the start of its analysis, it noted the real advantage the RPD has with regard to testimonies. Furthermore, the RAD considered the fact that the RPD, which heard the applicant in person, observed that [TRANSLATION] "the applicant's testimony was at best vague" (RAD Reasons and Decision, at para 44; RPD Reasons and Decision, at para 11). The RAD thus confirmed the RPD's findings on the testimony and added in its decision that, considering her profile as an educated person, the applicant was capable of providing more specific responses to key questions about her refugee claim. Considering that no hearing was held before the RAD, the Court is satisfied that the RAD showed deference to the RPD's credibility findings and that, overall, the RAD's decision is reasonable (*Akuffo*, above, at para 34).

[39] As for the applicant's profile, the RAD considered her arguments in the Memorandum of Appeal and concluded that the applicant failed to explain why her cultural and personal profile should be taken into account. The Court notes that the RAD correctly considered the applicant's profile (educated person who has a good job in accounting, person who has travelled several

times and who is not disadvantaged) and stated that the RPD did not err in adding the applicant's situation to the lack of credibility.

[40] The Court considers it important to mention that, in her Memorandum filed before this Court, the applicant seemed to present arguments addressed to the Board in general, rather than to the RAD. This dispute concerns the RAD's decision. After reviewing the entire record, the Court also notes that the applicant made the same submissions to this Court as she did during her appeal. In general, the applicant's arguments in judicial review do not demonstrate how the RAD erred. To support its reasons, the Court reiterates the conclusion in the decision *Abdullahi v. Canada (Citizenship and Immigration)*, 2016 FC 260 at para 26:

The Court finds no reviewable errors that could undermine the RAD's analysis of the RPD's credibility findings. In this respect, the Court generally agrees with the Respondent that the Applicant is asking the Court to reweigh the evidence on a number of different points that contributed to the adverse credibility findings, which is obviously not the Court's role.

[41] Given the significant contradictions between the applicant's testimony, her BOC and certain documents (i.e. complaint to the police) filed into evidence, the Court concludes that it was reasonable for the RAD to confirm the RPD's decision finding that the applicant's testimony was not credible. For these reasons, the Court is convinced that the RAD fulfilled its role as an appeal tribunal. The RAD's decision is reasonable, and intervention is not warranted.

IX. Conclusion

[42] For the reasons stated above, the application for judicial review is dismissed.

JUDGMENT in file IMM-4477-17

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

There is no question of importance to be certified. The style of cause has been modified to replace "The Minister of Immigration, Refugees and Citizenship" with "The Minister of Citizenship and Immigration."

"Michel M. J. Shore"

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: IMM-5469-17

STYLE OF CAUSE: SOMAIRA ALTAGRACIA FERMIN MORA v. THE
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