

Federal Court



Cour fédérale

Date: 20181120

Docket: IMM-551-18

Citation: 2018 FC 1169

[UNREVISED CERTIFIED ENGLISH TRANSLATION]

Ottawa, Ontario, November 20, 2018

PRESENT: The Honourable Mr. Justice Shore

BETWEEN:

YASMINA ATEK

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 under subsection 72(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA], of a decision by an officer of the Refugee Appeal Division (RAD) of the Immigration and Refugee Board (the Board), dated January 12, 2018, pursuant to subsection 111(1) of the IRPA. In that decision, the RAD confirmed the decision of

the Refugee Protection Division (RPD) that the applicant is neither a Convention refugee nor a “person in need of protection” within the meaning of section 97 of the IRPA.

II. Facts

[2] The Applicant, a 47-year-old female, is a citizen of Algeria.

[3] The applicant initially came to Canada in 2011, on a visitor’s visa. She states that her father had always been psychologically abusive towards her and that this psychological abuse had been her motivation for travelling to Canada. After living in Canada between 2011 and 2014, the applicant returned to Algeria, where she lived in her father’s home from December 2014 to May 2015. During this visit, her father allegedly informed her that he had found her a husband and that she would not be returning to Canada.

[4] Despite this, the applicant obtained another visa and returned to Montréal in May 2015, where she met an Algerian man shortly thereafter. The couple reportedly started living together in September 2015, the month when the applicant became pregnant. The applicant returned to Algeria—once again to her father’s home—from November to December 2015, for the purpose of renewing her visa. She decided not to reveal her pregnancy to her father during her visit to Algeria, knowing that he would take the news that she had conceived a child out of wedlock very badly. She only informed him about her pregnancy after she had returned to Canada. In response, her father allegedly disowned her and threatened to kill her if she returned to Algeria.

[5] The applicant married her child's father in January 2016 in order to resolve the situation. However, this did not soften her father's stance.

[6] The couple separated one month before Ms. Atek gave birth to their child, that is, in April 2016. The applicant allegedly requested the separation because her partner was living in Canada without any legal status and had a criminal record.

[7] The applicant applied for refugee protection in Canada because she fears that she would be persecuted by her family and society if she returned to Algeria. More specifically, she is afraid that her family would follow through on her father's death threat and that she would be persecuted by society because she is a single mother in her forties.

III. RPD decision

[8] The RPD concluded that the applicant was not a Convention refugee or a person in need of protection. The RPD therefore rejected Ms. Atek's refugee protection claim because her allegation that she had suffered psychological abuse at the hands of her father throughout her life lacked credibility. The RPD based its negative decision on the applicant's delay in claiming refugee protection after arriving in Canada, and on the fact that she had twice returned to live with her father, despite his alleged ill-treatment of her.

[9] The applicant filed an appeal from this decision and submitted new evidence in support of her appeal, requesting a hearing before the RAD.

IV. RAD decision

[10] In a decision dated January 12, 2018, the RAD confirmed the decision of the RPD and dismissed the appeal. That decision is the subject of this judicial review.

A. *New evidence*

[11] In accordance with subsection 110(4) of the IRPA, the RAD admitted a letter dated August 24, 2016, into evidence; this letter was written by the applicant's sister, who also lives in Montréal. According to the RAD, the letter in question is relevant to the case because it addresses the applicant's fear of returning to Algeria.

[12] The RAD decided that the document met the requirements of subsection 110(6) of the IRPA because it raises a serious issue with respect to the applicant's credibility, is central to the decision, and could justify granting or refusing the refugee protection claim. Consequently, the application for a hearing before the RAD was accepted.

[13] At the hearing, the RAD called the applicant's sister to testify. The RAD found that the applicant's sister provided testimony that was [TRANSLATION] "contradictory" and [TRANSLATION] "not very credible". Consequently, the Board member did not ascribe any probative value to the letter submitted for the purposes of the hearing. The RAD also called the applicant to testify at this hearing.

B. *Findings of the RAD*

[14] After considering all of the evidence, including the recording of the hearing before the RPD, the testimony of the applicant's sister and the applicant's testimony before the RAD, the RAD concluded that the RPD did not provide sufficient grounds for its negative decision concerning the applicant's credibility. The RAD was of the opinion that, in order to analyze the applicant's prospective fear, the RPD should also have considered the fact that the applicant had conceived a child out of wedlock. However, even though the RAD found the RPD's analysis to be [TRANSLATION] "deficient", the Board member did not find this error to have been fatal to the final decision.

[15] In the applicant's file, the RAD noted some inconsistencies affecting her credibility, including the following:

(i) The applicant met a man and became pregnant with his child. She then allegedly asked this man to marry her due to her strict religion. The couple married in January 2016. However, the applicant already wanted a separation just a few months afterwards. The RAD did not find the applicant's claim that she wanted to end her relationship with her husband, one month before giving birth to their child, to be credible, since she was the one who had insisted that they get married because she was pregnant;

(ii) Following the contradictory testimony of the applicant's sister, the RAD was not satisfied that the applicant and her husband were in fact separated. Moreover, the child's birth

registration document indicates that he was living at the same address as the applicant”.

However, that document was completed on May 19, 2016, one month after her husband had left the family home, according to the applicant;

(iii) The applicant alleges that she has reason to be afraid because she conceived a child out of wedlock. However, in the opinion of the RAD, the applicant was not at risk under section 96 and subsection 97(1) of the IRPA because she is still married and not separated. Moreover, she had voluntarily returned to Algeria to live with her father while she was pregnant.

[16] For these reasons, the RAD confirmed the decision of the RPD and dismissed the appeal.

V. Issue

[17] The Court rephrases the applicant’s questions as follows: Was the decision rendered by the RAD reasonable?

[18] The standard of review applicable to RAD decisions in an appeal from a decision of the RPD is reasonableness (*Dunsmuir v New-Brunswick*, 2008 SCC 9 at para 47; *Canada (Citizenship and Immigration) v Huruglica*, 2016 FCA 93 at paras 2 and 35; *Singh v Canada (Citizenship and Immigration)*, 2017 FC 719 at para 9).

VI. Relevant provisions

[19] The following provisions of the IRPA are relevant:

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 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,

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 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,

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.

Decision

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

(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.

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.

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.

VII. Analysis

[20] The overriding issue in this case is credibility. The applicant claims that she would be persecuted by her family and by society in general if she returns to Algeria because she lived with her husband and became pregnant before they married. The onus was on the applicant to demonstrate the truthfulness of these allegations.

A. *Family persecution*

[21] According to the applicant, her sister's testimony indicating that her father had made threats against her should benefit from the presumption of truthfulness of witnesses. However, the Board came to the opposite conclusion because it had noted a number of reasons to doubt the truthfulness of the testimony (*Maldonado v Canada (Minister of Employment and Immigration)*, [1980] 2 FC 302 at para 5). Doubts may arise when the evidence does not support the applicant's claims or when the applicant provides contradictory or implausible testimony.

[22] The applicant is of the opinion that since doubts were raised by testimony concerning peripheral aspects of the claim for refugee protection, the credibility of the witness should not be tainted on that basis. Here, the applicant is alluding to the contradictions concerning the timing of the couple's alleged separation, a fact which partly served as the basis for the RAD's finding that the applicant and the father of her child were still a couple. Since the applicant is referencing her situation as a single mother to demonstrate the persecution that she could potentially suffer if she returned to Algeria, the Court rejects the idea that it is a peripheral aspect of the application. The RAD could therefore conclude that the applicant's sister lacked credibility, based on her

testimony on that subject. The RAD's determination on this point is transparent, logical and well supported. The Court will therefore accept the RAD'S finding in this regard.

[23] Consequently, evidence of the father's threats was based solely on the applicant's statements. However, the RAD refused to believe that the applicant had been mistreated by her father, for three reasons. First, if the applicant had in fact been mistreated by her father in the past, it seemed implausible to the RAD that she would go back to living in her father's home when she returned to Algeria, including when she was pregnant. Second, the applicant waited a number of years after her first visit to Canada to claim refugee protection. According to the RAD, this was also inconsistent with the alleged abuse reported by the applicant. Lastly, the RAD was of the view that since the applicant is now married, her father should no longer feel that she has brought shame upon her family.

[24] Since this matter involves a determination of the applicant's credibility, the Court will refrain from intervening unless the decision rendered by the RAD is "perverse, capricious or based on erroneous findings of facts" (*Siad v Canada (Secretary of State)*, [1997] 1 FC 608 (FCA) at para 24). In *Rahal v Canada (Citizenship and Immigration)*, 2012 FC 319 [*Rahal*], Justice Mary J. L. Gleason reviewed the case law on the definitions of the words "perverse" and "capricious". She noted that a decision will be considered to be perverse if the findings are contrary to the evidence, and "that inferences based on conjecture are capricious". However, the Court must distinguish between conjecture and inference, as the former is based on a mere guess, while the latter is a deduction from the evidence (*Rahal*, above, at para 37).

[25] Of the three elements cited by the RAD in determining that the father's threats had been made up, the first two were based on evidence and fall within the scope of possible conclusions that may be drawn by a court. However, with respect to the third element, there is no basis for the reasons provided by the RAD. The RAD should make a plausibility finding "only in the clearest of cases, i.e., if the facts as presented are outside the realm of what could reasonably be expected, or where the documentary evidence demonstrates that the events could not have happened in the manner asserted by the claimant" (*Valtchev v Canada (Ministry of Citizenship and Immigration)*, 2001 FCT 776 at para 7 [*Valtchev*]). Moreover, the RAD should avoid falling into the trap of applying Canadian standards to an Algerian situation (*Valtchev*, above, at para 7). Despite the deference that this Court owes the RAD with respect to issues of credibility, the RAD must nevertheless base its decision on logic that relies on facts, which it failed to do on this point. Consequently, the Court finds that the RAD merely resorted to conjecture regarding the reaction of the applicant's family, thereby rendering its finding in this regard perverse. Nonetheless, this is not fatal to the outcome of this case.

B. *Persecution by society in general*

[26] The applicant also presented evidence to the effect that a single mother in Algeria would suffer persecution from society in general. However, the RAD found that the applicant was not separated from her husband. It based this finding on several clues: 1) The RAD noted contradictions between the appellant's testimony and the testimony provided by her sister regarding the timing of the separation; 2) based on the context in which the applicant had insisted on getting married in order to resolve her situation, it seemed implausible that the applicant would then initiate a separation one month before giving birth; 3) the applicant stated that she

had decided to separate from her husband after a minor quarrel, which seemed implausible in light of the reasons that had prompted them to get married in the first place; 4) the applicant's husband gave the same address as she did on their son's birth certificate, when the child was born after his parents' alleged separation; and 5) divorce proceedings had not been initiated. Therefore, according to the RAD, the applicant was not separated, and its assessment should instead be based on the situation of a married woman in Algeria. The RAD ultimately found that the applicant would not suffer persecution in Algeria if she did not live in the same city as her family, the main agent of her persecution. This finding does not seem unreasonable.

[27] This Court will intervene only if the decision rendered by the RAD falls outside the scope of possible outcomes in this case, based on the evidence on record. In the case at hand, the RAD conducted an in-depth analysis of the file, provided the applicant with an opportunity to submit additional evidence, held a hearing, and concluded that the applicant did not discharge her burden of proving that she was in fact separated and would therefore be returning to Algeria as a single mother, where she would be persecuted by society. This conclusion falls within the scope of possible outcomes in this case.

VIII. Conclusion

[28] For the reasons given above, this application for judicial review is dismissed.

JUDGMENT in IMM-551-18

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

There is no question of importance to be certified. The style of cause is hereby amended to reflect the correct respondent, the Minister of Citizenship and Immigration.

“Michel M.J. Shore”

Judge

Certified true translation
This 20th day of December, 2018.

Michael Palles, Translator

FEDERAL COURT
SOLICITORS OF RECORD

FILE: IMM-551-18

STYLE OF CAUSE: YASMINA ATEK v THE MINISTER OF
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