

Federal Court



Cour fédérale

Date: 20190121

Docket: IMM-1754-18

Citation: 2019 FC 85

Ottawa, Ontario, January 21, 2019

PRESENT: The Honourable Mr. Justice Russell

BETWEEN:

ROCHELLE KEISHA HARRY

Applicant

and

**THE MINISTER OF CITIZENSHIP AND
IMMIGRATION**

Respondent

JUDGMENT AND REASONS

I. INTRODUCTION

[1] This is an application under s 72(1) of *the Immigration and Refugee Protection Act*, SC 2001, c 27 [Act], for judicial review of the decision of the Refugee Protection Division of the Immigration and Refugee Board of Canada [RPD], dated March 1, 2018 [Decision], which refused the Applicant's application to be deemed a Convention refugee or a person in need of protection under ss 96 and 97 of the Act.

II. BACKGROUND

[2] The Applicant, Rochelle Keisha Harry, is a citizen of Saint Vincent.

[3] The Applicant began a romantic relationship with a man on February 17, 2006 in Saint Vincent. She alleges that her romantic partner, who is the father of her child, severely abused her. The Applicant endured physical and sexual abuse as well as death threats. She travelled to Canada in 2008 to escape the abuse, but was persuaded by her partner to return. Shortly after returning, the abuse started again.

[4] After a particularly severe beating, the Applicant says she went to the police. The officer who heard the complaint informed her that the police did not get involved in domestic disputes. An officer did, however, warn the partner not to abuse the Applicant any more. The Applicant says she went to the police a second time in order to report another incident of abuse. The police repeated the refrain that they would not get involved in domestic disputes.

[5] The Applicant says she left her partner and went to her mother's house and then to stay at a friend's house. The Applicant's partner managed to find where she was staying and confronted her friend. The Applicant went to back her mother's house and then to her mother's friend's house. Finally, the Applicant fled to Canada.

[6] The Applicant arrived in Canada in 2009, but did not file a refugee claim until 2012. According to the Applicant, she did not know that she could file a claim for refugee protection

until 2012. The Applicant claims that she received legal advice in 2010 that she was unable to apply for refugee protection. It was not until 2012 she learned that a refugee claim was possible.

III. DECISION UNDER REVIEW

[7] The RPD determined that the Applicant is neither a Convention refugee or a person in need of protection. The determinative issue was the Applicant's credibility. The RPD noted the presence of major omissions, contradictions, and vague answers during her testimony.

[8] The RPD determined that the Applicant had omitted in her written account to include a threat of beating between April and July of 2007, a beating in December 2007, a beating in October 2008, and two beatings between December 2008 and January 2009. The RPD found that the Applicant was unable to explain these omissions.

[9] The RPD considered the Applicant's claim that her partner beat her to the point of unconsciousness and then left the house. She was unable to explain when her partner had come back home. The RPD held that the Applicant's credibility was undermined by her inability to provide an explanation for this element of her account.

[10] The RPD noted that the Applicant's written account specified that she did not go to the police after the March 2008 beating. During the oral hearing, however, the Applicant stated that she went to the police in either March or April of 2008. The RPD determined that this was a contradiction which undermined the Applicant's credibility.

[11] Based on the unexplained omissions and contradictions, the RPD determined that the Applicant was not credible. As a result, the RPD did not address the adequacy of state protection or the availability of an internal flight alternative.

[12] Due to the credibility concerns, the RPD attached no probative value to a letter written by the Applicant's mother which supported her refugee claim.

[13] The RPD determined that the Applicant's behaviour was inconsistent with her stated fear. While she testified that she came to Canada in 2008 in order to escape her abusive partner, she wrote on her Personal Information Form that the purpose of the trip was to visit her friends. Additionally, the RPD noted that the Applicant arrived in Canada for a second time in 2009, but waited over three years to file a claim for refugee protection. The RPD did not accept the Applicant's explanation that she did not know that she could claim refugee protection until 2012. The RPD also noted that the Applicant had met with a lawyer in 2010. According to the RPD, this contradicted the Applicant's explanation for her delay in making a claim.

[14] The RPD stated that it had abided by the Immigration and Refugee Board of Canada's guideline on gender-related persecution and violence against women [Gender Guidelines]. However, the RPD concluded that "the guideline does not apply to the female claimant for the reasons set out in this decision" (Applicant's Record at 12).

IV. ISSUES

[15] The issues to be determined in the present matter are the following:

1. What is the standard of review?
2. Was the RPD's Decision reasonable?

V. STANDARD OF REVIEW

[16] The Supreme Court of Canada in *Dunsmuir v New Brunswick*, 2008 SCC 9 [*Dunsmuir*], held that a standard of review analysis need not be conducted in every instance. Instead, where the standard of review applicable to a particular question before the court is settled in a satisfactory manner by past jurisprudence, the reviewing court may adopt that standard of review. Only where this search proves fruitless, or where the relevant precedents appear to be inconsistent with new developments in the common law principles of judicial review, must the reviewing court undertake a consideration of the four factors comprising the standard of review analysis: *Agraira v Canada (Public Safety and Emergency Preparedness)*, 2013 SCC 36 at para 48.

[17] A standard of reasonableness applies to the RPD's credibility findings as well as other determinations based on mixed fact and law (*Koffi v Canada (Citizenship and Immigration)*, 2016 FC 4 at para 27).

[18] When reviewing a decision on the standard of reasonableness, the analysis will be concerned with "the existence of justification, transparency and intelligibility within the decision-making process [and also with] whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law." See *Dunsmuir*, above, at para 47, and *Canada (Minister of Citizenship and Immigration) v Khosa*, 2009 SCC 12 at

para 59. Put another way, the Court should intervene only if the Decision was unreasonable in the sense that it falls outside the “range of possible, acceptable outcomes which are defensible in respect of the facts and law.”

VI. STATUTORY PROVISIONS

[19] The following statutory provisions of the Act are relevant to this application for judicial review:

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

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

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

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

(2) A également qualifié de personne à protéger la personne qui se trouve au Canada et fait partie d'une

is also a person in need of protection.

catégorie de personnes auxquelles est reconnu par règlement le besoin de protection.

VII. ARGUMENT

A. *Applicant*

[20] The Applicant says that the RPD erred by failing to apply the Gender Guidelines. She also says that it was an error for the RPD to make negative credibility findings based on her failure to include several incidents of domestic abuse in her written narrative. It is not possible for an abused woman to describe each incident of violence. Instead, she detailed the most notable incidents. The RPD lacked sensitivity and understanding of the gender-based claim when it demanded precise dates of incidents of abuse.

[21] The Applicant says that the RPD made an error of law by deciding that the Gender Guidelines did not apply. The RPD was obliged to conduct its assessment of her credibility within the context of the Gender Guidelines. The RPD erred by separating these two analyses. The Applicant also says that the discrepancies in her testimony should have been considered within the context of the Gender Guidelines.

[22] The Applicant says that the RPD erred in its assessment of her credibility. Firstly, the RPD's findings of omissions were made in disregard of the Gender Guidelines. Secondly, the sole contradiction in the Applicant's evidence was the result of the RPD's pressure for her to provide a date. The RPD's credibility assessment focused excessively on minor inconsistencies.

[23] The Applicant says that the RPD erred in its assessment of the delay in filing a claim for refugee protection. She explained to the RPD that the lawyer she spoke to advised her that she could not file a refugee claim. It was only later that she learnt that she was able to file one. This explanation is reasonable in the circumstances. Specifically, delays of this nature may be justified in cases of sexual abuse. Repressed trauma can justify delay. The RPD erred by not considering this explanation.

B. *Respondent*

[24] The Respondent emphasizes that significant deference is owed to the RPD in relation to its credibility findings. The RPD reasonably made negative credibility inferences based on the contradictions in the Applicant's testimony.

[25] The Respondent disagrees with the Applicant's argument that the RPD found the Gender Guidelines to be inapplicable. To the contrary, the RPD stated that it had taken the Gender Guidelines into account.

[26] The Respondent says that the RPD's assessment of the delay was reasonable. The RPD did not ignore the explanation provided by the Applicant. The Applicant merely disagrees with the RPD's assessment of the delay. The Respondent says that the Applicant filed no psychological evidence to substantiate the notion that repressed trauma could justify the delay.

VIII. ANALYSIS

[27] The Applicant has raised a number of issues for review that I will address in turn.

A. *Gender Guidelines*

[28] The Applicant complains that the RPD failed to conduct its credibility assessment “within” the context of the Gender Guidelines:

[T]he approach the Board took was to make the credibility assessment without reference to the Guidelines and, if the Applicant met the credibility test, then the Guidelines would be applied to her.

[29] The Applicant says that the RPD made the same error with regard to its treatment of the discrepancies it found in the Applicant’s testimony: “These were minor in nature but sufficient to ground the negative credibility assessment that led to the non-application of the Gender Guidelines.”

[30] In the end, the Applicant says that “the Board merely [paid] lip service to the Gender Guidelines, which it then dismissed from the analysis entirely.”

[31] The jurisprudence of the Court is to the effect that the RPD is obliged to weigh the evidence with the Gender Guidelines in mind. See, for example, *Jones v Canada (Minister of Citizenship and Immigration)*, 2006 FC 405 at paras 14-18.

[32] The RPD explains its use of the Gender Guidelines in this case as follows:

[29] In the case of the female claimant, the panel would like to note that it abided by the Immigration and Refugee Board of Canada's guideline on gender-related persecution and violence against women. However, that guideline does not apply to the female claimant for the reasons set out in this decision.

The "reasons set out in the decision" refer to omissions from the Applicant's written account of the violence she alleged she had suffered and that she was unable to explain at the hearing, as well as a contradiction between her written account and oral evidence about whether she went to the police. The omissions and contradictions relied upon by the RPD are related to a period of the Applicant's life that is a considerable number of years before the hearing. The RPD required the Applicant to be precise about the timing of events that the passage of time would make it very difficult to be precise about in a context that required the RPD to carefully consider the Gender Guidelines.

[33] Based upon these omissions and contradictions, the RPD comes to the following conclusions:

[14] In light of the omissions and contradictions noted, the panel does not believe the female claimant and, as a result, does not believe her alleged fears. Lack of credibility is sufficient grounds for rejecting a claim for refugee protection. The Federal Court has ruled to that effect in a number of cases.

[34] None of this really explains why "the guideline does not apply to the female claimant...." Omissions and contradictions are not, *per se*, a reason to exclude consideration of the Gender Guidelines. The purpose of the Gender Guidelines is to ensure that any assessment of omissions and contradictions takes into account the factors set out in the Gender Guidelines. If what the RPD is saying here is that the "omissions" and the "contradiction" in question cannot be

explained by the factors set out in the Gender Guidelines and, in particular, how those factors may influence the testimony of women who have been the victims of persecution, the RPD does not, in fact, provide reasons why the Gender Guidelines do not impact its analysis in this case. In my view, then, the Gender Guidelines are not taken into account in a meaningful way. I think the words of Justice Gagné in *Odia v Canada (Citizenship and Immigration)*, 2014 FC 663 are equally applicable to the present case:

[9] I agree with the applicant that in order for the RPD to take the Gender Guidelines into account in a meaningful way, it has to assess a claimant's testimony while being alert and sensitive to her gender, the social, cultural, economic and religious norms of her community, and "to the factors which may influence the testimony of women who have been the victims of persecution" (*Bennis v Canada (Minister of Immigration and Citizenship)*, 2001 FCT 968 at para 14). Here, it is in the assessment of the applicant's testimony that the RPD member lacked the requisite sensitivity. In that sense, the Gender Guidelines were not properly applied and the applicant's expectations were not satisfied.

[35] The Respondent says that para 29 of the Decision is not an accurate description of what the RPD actually does in its Decision. However, if the RPD meant something else by "that guideline does not apply to the female applicant...", then it should have said so, and my reading of the transcript does not suggest to me that the RPD was mindful of, and applied, the Gender Guidelines in any meaningful way.

[36] In addition, a reading of the Certified Tribunal Record (pp 170-171) reveals that there was no contradiction. It is clear that the Applicant means she went to the police at a later date, and the RPD gives no reason why this was not an acceptable explanation.

B. *Delay in Claiming*

[37] The RPD also faults the Applicant for her failure to make a refugee claim in a timely way:

[24] Not only did she not claim refugee protection when she arrived, but she also waited until September 2012, more than three years later, to claim refugee protection.

[25] When asked why she did not claim refugee protection when she arrived, the female claimant stated that she did not know she could claim refugee protection. The panel does not accept the female claimant's allegation. It should be noted that she came to Canada in 2008 and stayed with her mother's friends for three months. At that time, she had the opportunity to ask people who, according to her, had lived in Canada for a long time, about the steps she could take. Then, when asked why, given the alleged circumstances, she had waited more than three years to claim refugee protection, the female claimant stated that she did not know she could claim refugee protection until August 2012, which the panel does not believe. Indeed, she also stated that she met with a lawyer in 2010, which contradicts her allegations that she did not learn that she could claim refugee protection until August 2012.

[26] The panel is not satisfied with the unconvincing explanations provided, and is of the opinion that the female claimant's attitude, in both 2008 and 2009, was not that of an individual who fears returning to her country of origin.

[27] The panel is of the opinion that the female claimant's answers and explanations do not justify her failure to claim refugee protection in 2008 or the fact that she waited three and a half years into her most recent stay before claiming refugee protection. The female claimant's attitude and testimony on this point clearly demonstrate that she is not credible when she states that she left her country out of fear of her spouse and fear that, as she stated, she would be killed if she were to return.

[38] The Applicant's explanation for the delay in claiming was as follows:

I could not get... do no refugee, that is what the lawyer told me, because I told him the situation and that is when (inaudible) no, I cannot do it. The only thing I can do is humanitarian.

(Certified Tribunal Record at p 178).

[39] It would appear from the Applicant's evidence that she made a claim soon after she learned she could, in fact, make one. The RPD's reasons for rejecting this explanation are speculative:

- (a) "[S]he came to Canada in 2008 and stayed with her mother's friends for three months. At that time she had the opportunity to ask people who, according to her, had lived in Canada for a long time, about the steps she could take."
- (b) The RPD did not believe "that she did not know she could claim refugee protection until August 2012, which the panel does not believe. Indeed she also stated that she met with a lawyer in 2010, which contradicts her allegations that she did not learn that she could claim refugee protection until August 2012."

[40] This does not address the Applicant's explanation that the lawyer she consulted advised her she could not make a refugee claim and should, instead make a humanitarian and compassionate claim.

[41] These explanations are not reasonably dealt with by the RPD.

IX. CONCLUSIONS

[42] Generally speaking, the Decision is unreasonable for the reasons given and should be returned for reconsideration.

[43] The parties agree there is no question for certification and I concur.

JUDGMENT IN IMM-1754-18

THIS COURT'S JUDGMENT is that

1. The application is allowed. The Decision is quashed and the matter is returned for reconsideration by a differently constituted RPD.
2. There is no question for certification.

“James Russell”

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: IMM-1754-18

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