

Federal Court



Cour fédérale

Date: 20190531

Docket: IMM-5023-17

Citation: 2019 FC 775

Ottawa, Ontario, May 31, 2019

PRESENT: The Honourable Madam Justice Elliott

BETWEEN:

PAMELA BIRUNGI LUMALA

Applicant

And

**THE MINISTER OF CITIZENSHIP
AND IMMIGRATION**

Respondent

JUDGMENT AND REASONS

I. Overview

[1] This is an application under subsection 72(1) of the *Immigration and Refugee Protection Act*, SC 2001, C27 (the *IRPA*) in which the applicant, Ms. Lumala, seeks review of the October 20, 2017 decision (the Decision) of the Refugee Appeal Division of the Immigration and Refugee Board (the RAD) which rejected the Applicant's appeal of the decision of the Refugee Protection Division of the Immigration and Refugee Board (the RPD).

[2] The Applicant is a citizen of Uganda who claimed that she was the victim of domestic violence by her former common-law partner, referred to as Kennedy. She claimed that Kennedy emotionally, physically and sexually abused her while they were together between 1999 and 2004 at which time she left him.

[3] The Applicant subsequently had a child in 2012 with another man from whom she then separated after Kennedy burst into the child's first birthday party and told her that she was involved with a married man. When that proved to be true, the Applicant ended the relationship.

[4] The Applicant later met a man, referred to as Yosamu, with whom she has a child. In March 2016, the Applicant and Yosamu had a traditional marriage ceremony.

[5] On May 20, 2016, Kennedy and two other men went to the Applicant's house. When the Applicant would not come out and talk to him, Kennedy fired a bullet through a bedroom window. At that time, the Applicant and Yosamu decided that she should flee to Canada and leave her daughter with her sister. She arrived in Canada on June 22, 2016.

[6] The RPD concluded that the Applicant is neither a Convention refugee nor a person in need of protection. It found that she was generally lacking credibility and had not established that she was at risk of harm from Kennedy.

[7] The RAD dismissed the Applicant's appeal but found that it was more likely than not that she had suffered abuse at the hand of her former partner. However, it also found that there was

insufficient reliable evidence to establish that the May 20, 2016 incident took place or to indicate that Kennedy continues to pursue her with the intent of harming her or her children.

[8] For the reasons that follow, this application will be dismissed. The Decision is reasonable: the outcome is within the range of possible, acceptable outcomes that are defensible on the facts and law.

II. Issue and Standard of Review

[9] The sole issue is whether the credibility findings made by the RAD were reasonable. The standard of review of the RAD's decision is reasonableness: *Canada (Minister of Citizenship and Immigration) v Huruglica* 2016 FCA 93 at para 35 (*Huruglica*).

[10] A decision is reasonable if the decision-making process is justified, transparent and intelligible resulting in a determination that falls within the range of possible, acceptable outcomes which are defensible on the facts and law: *Dunsmuir v New Brunswick*, 2008 SCC 9 at para 47 (*Dunsmuir*).

[11] The RPD and the RAD are not required to consider and comment in their reasons upon every issue raised by the parties. If the reasons, when read as a whole, "allow the reviewing court to understand why the tribunal made its decision and permit it to determine whether the conclusion is within the range of acceptable outcomes, the *Dunsmuir* criteria are met": *Newfoundland and Labrador Nurses' Union v Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62 at para 16 (*Nfld Nurses*).

[12] The issue for the reviewing court is whether the decision, when viewed as a whole in the context of the record, is reasonable: *Nfld Nurses* at para 16.

III. Analysis

A. *Role of the RAD*

[13] In reviewing the reasonableness of the Decision, it is helpful to first set out the role of the RAD when it hears an appeal of a decision made by the RPD.

[14] The role of the RAD is to intervene if it determines that the RPD is wrong in law, in fact or in fact and law. The RAD performs a correctness review. However, if it finds the RPD erred, that is not the end of the matter. The RAD can confirm the RPD's decision on another basis. In the alternative, it may refer the matter back to the RPD for redetermination with any directions that it considers appropriate if it determines that a decision confirming or setting aside the RPD decision cannot be made without hearing the evidence presented before the RPD: *Huruglica* at paras 78 and 69.

B. *Positions of the Parties*

[15] The parties agree that the critical finding by the RAD was that it did not believe the Applicant when she claimed that on May 20, 2016 Kennedy went to her home with two other men, confronted her and fired a bullet through her bedroom window when she would not leave the house to speak to him.

[16] The Applicant claims the decision by the RAD was unreasonable as it lacked justification, transparency, and intelligibility. She specifically takes issue with what she says are the way the RAD handled the joint report of her Physiotherapist and Psychologist and its finding that the Police Report she submitted was neither reliable nor trustworthy.

[17] The Respondent submits that the RAD followed the process set out in *Huruglica* and performed its own assessment of the evidence. It found no material errors in the RPD decision and although it disagreed with some findings of the RPD, it agreed that the Applicant had failed to establish the merits of her claim.

[18] The Applicant's overall complaint is that instead of looking at the 'big picture', the RAD took a microscopic approach when making the credibility findings.

C. *The Police Report*

[19] Two specific criticisms have been raised by the Applicant concerning the RAD's treatment of the police report that was written as a result of the May 20, 2016 incident in which Kennedy was alleged to have fired a bullet through her bedroom window.

(1) The Description of the Vehicle that Kennedy drove on May 20, 2016

[20] The Applicant says that when the RAD focussed on her description of the car that Kennedy was driving when he went to her house it took an unjustified, overzealous approach in order to identify discrepancies in her testimony and make a negative credibility finding.

[21] The Respondent says that the RAD reasonably drew an inference against the Applicant's credibility as the gunshot incident on May 20, 2016 was a key part of the Applicant's claim. The Applicant's description of the car that Kennedy was driving that day is in the police report. The fact that the Applicant's testimony was different than what she told the police is important.

[22] The RPD had noted that the police report said that the Applicant reported Kennedy's car was a grey Toyota Land Cruiser. In her Basis of Claim form (BOC), the Applicant described it as a blue Range Rover. When asked by the RPD to explain the discrepancy, her answer was that she was not good with vehicles.

[23] The Applicant submitted to the RAD that the discrepancy in her description of the vehicle was a minor detail. It alone could not justify the RPD's finding that the gunshot incident did not happen at all or that Kennedy did not exist.

[24] The RAD reviewed the police report taking into account the Applicant's testimony before the RPD and in the BOC narrative. It found the discrepancy with respect to the colour and make of the car that Kennedy was said to have been driving on May 20, 2016 was problematic.

[25] While generally speaking the make and colour of the car was peripheral to the incident, it was a significant element to the Applicant who mentioned it several times. In her BOC, it was described as a blue Range Rover. In the police report it was described as a grey Toyota Land Cruiser car. In her testimony at the hearing, she said it was a grey Land Cruiser.

[26] The RAD found that the details were important to the Applicant in that she volunteered the make and colour of the car. She was not asked to provide the details but, each time, she provided the colour and model. In the police report, she provided the colour, make and model.

[27] On reviewing the record, I am persuaded that the analysis by the RAD was not microscopic. The problem with the Applicant's differing descriptions of the vehicle reasonably led to a concern that she was either exaggerating her story to make it more believable or that she had fabricated the story from the beginning. It is within the range of possible, acceptable outcomes to draw those conclusions. This is particularly so given that the Applicant was not asked to provide that level of detail.

[28] When questioned about the details of the vehicle by the RPD, the Applicant confirmed it was a Land Rover although having initially said it was a grey Land Cruiser. The RAD noted that she also initially said that she heard a car, not that she saw a car. It found that explanation did not explain how she knew the car was a Land Cruiser as she had earlier testified that she did not know cars very well and was "not so good with cars".

(2) The Discrepancy in the Date of Separation of the Applicant and Kennedy

[29] In her BOC, the Applicant stated that she and Kennedy separated in 2004. In the police report, the date given is 2014. The Applicant says that when she went to the police station to report the May 20, 2016 incident she wrote out her statement but the police officer rewrote it and the mistake must have been made at that time. Then, when she read over the report, she must have missed the mistake.

[30] The RAD found that it was not clear that the Applicant first wrote out her statement and that it was rewritten by a police officer. It concluded that it was more likely that the Applicant provided an oral statement to the police officer. The reason for this conclusion was that at the end of the report it said:

STATED BY: Pamela Birungi Lumala

RECORDED BY: ASP Bajibu Joseph

[31] In addition, the RAD found that because the Applicant, in her testimony, stated that she read and then signed the report she was attesting to its accuracy, even if it was an honest mistake as she claimed. On the other hand, if she had provided an oral statement to the police officer the likelihood that he would write 2014 rather than 2004 was more remote. The RAD concluded that the discrepancy cast doubt on the authenticity and reliability of the police report.

[32] That is a reasonable and defensible analysis by the RAD.

[33] The Applicant had submitted to the RAD that the RPD had found the police report to be fraudulent based on the prevalence of fraudulent documents in Uganda. But, it did so without referring to the actual police report.

[34] The RAD carefully examined the police report and determined that there were discrepancies on the face of it:

- two of the three pages included a form of letterhead; the second page did not;
- the name of the police station had been hand written over previous wording;

- the stamp at the bottom of the first and last page referred to the NSANGI POLICE POST but the letterhead referred to the NSANGI POLICE STATION;
- two of the three pages included the name of the Applicant and her signature confirming that she had read and concurred with the content; the second page did not.

[35] After acknowledging that documents in developing countries do not always have the sophistication of those in North America, the RAD found that the irregularities were of a kind that would not be expected, particularly when compared to samples of other police-related documents in Uganda such as summonses and arrest warrants. On that basis, the RAD found the police report to be unreliable and gave it no evidentiary weight.

[36] The Respondent submits that as much as the various discrepancies in the police report, both as to the car and the date of separation, were problematic, it was the Applicant's explanations that were the real issue.

[37] When the Applicant said she read over the police report and signed it but did not notice the date discrepancy of 2004/2014 it was open to the RAD not to accept that explanation.

[38] When the Applicant's testimony disagreed with the contemporaneous police report description of the car driven by Kennedy, it was open to the RAD to find her explanation that she was not good with cars unsatisfactory as in her testimony before the RPD she described the vehicle as an SUV, not once but three times.

[39] The RAD's analysis of the police report is clear. The reasoning process is transparent, intelligible and justified. It is not the role of this court to second-guess all the RAD, which is owed significant deference, or to reweigh the evidence before it.

D. *The Psychological Evidence*

[40] The Applicant was interviewed by a Registered Psychotherapist who was under the direct supervision of a Registered Psychologist. A total of four tests were administered to the Applicant over approximately one hour. The resulting diagnosis was that the Applicant suffered from severe anxiety and depression in relation to her experiences in Uganda. She experienced social isolation, changes in sleep patterns, flashbacks, intrusive and persistent thoughts, and cognitive difficulties. She was diagnosed with Post-Traumatic Stress Disorder with Delayed Onset.

[41] The authors of the report were of the opinion that if the Applicant was asked to return to Uganda her symptoms would deteriorate and likely cause significant impairments. It was strongly suggested that she be granted refugee status and permitted to remain in Canada as "she appears to be a motivated individual who aspires to be a contributing member of society."

[42] The recommended treatment for the Applicant was that she attend supportive counselling to address her psychological and/or emotional issues pertaining to her pre-and-post-immigration to Canada.

[43] The Applicant says the tests relied upon in the report and the conclusions based on those tests are relevant to the credibility findings that were made against her when she testified. The

RAD, unlike the RPD, accepted that the Applicant had been abused in the past; but it had failed to take into account that the abuse could have affected her testimony at the RPD hearing, which may have explained her purported inconsistencies.

[44] The Respondent points out that the RAD did consider the psychological report and accepted that the Applicant had been abused in the past. As to the possible impact on the Applicant's testimony, the Respondent points out that the problem was not slips in the Applicant's train of thought but direct contradictions between her BOC form and her testimony.

[45] I am not persuaded by the Applicant's position on the psychological evidence for several reasons.

[46] First, it is important to contextualize how the RAD treated the psychological evidence at bar. The RAD reversed the RPD finding that the psychological report could not be accepted because the Applicant was the source of the information and she had been found to be not credible. Instead, the RAD found that the Applicant had suffered from abuse, pointing as well to her BOC narrative which referred to years of prior domestic abuse.

[47] The RAD also noted though that it should be cautious because both the psychological report and the letter from the Canadian Centre for Victims of Torture (CCVT) had crossed over into advocating for the Applicant. It noted that Mr. Justice Mosley had warned in *Molefe v Canada (Citizenship and Immigration)*, 2015 FC 317 at paragraphs 31-33 that it was problematic when that occurred.

[48] Notwithstanding the advocacy aspect of the report and the letter, the RAD found that it was more likely than not that the Applicant had suffered abuse from her former partner and that it has continued to manifest itself in various symptoms.

[49] Second, the submissions made to the RAD did not suggest that the Applicant's testimony had been affected by her mental health issues. Nor does the psychological report suggest the Applicant would have issues testifying. The Applicant's submission, in turn, amounts to post-hearing speculation.

[50] Here, it is critical not to lose sight of the actual diagnosis made by the mental health professionals. The results from the psychological screening tests were that the Applicant was suffering from severe anxiety and depression and her symptoms manifested in social isolation, changes in sleep patterns, flashbacks, intrusive and persistent thoughts, and cognitive difficulties. It was recommended that she attend supportive counselling to address her issues.

[51] The underlying record contains various support letters authored at the same general time as the psychological report and CCVT letter. They paint a different picture of the Applicant's ability for social interaction. They indicate the Applicant had "good relationships" and a "hard work ethic" at Adam House, where she was living. The letter from Dominion Church International states that the Applicant served as a volunteer in the children's ministry and her service was "invaluable". She was involved in child-minding during Sunday school and helping out in the hospitality department. Another letter described the Applicant as a "strong and well-

connected community member who has demonstrated resilience and hope despite her horrible past”.

[52] Other than a passing reference to cognitive difficulties, nothing in the psychological report would support an argument that the Applicant’s testimony at the RPD may have been affected by her mental health issues. The report noted that the Applicant felt her memory and concentration had declined and she used memory aids such as a diary. There is nothing in the report to flag for the RAD that the Applicant would or might have any issues testifying.

[53] Finally, the Applicant submits that by discussing the psychological report at the end of the Decision, after it had already found the Applicant was not credible, the RAD assessed the report in light of the credibility finding. In effect, the Applicant argues that the RAD did the analysis in reverse. The Applicant cites *Belahmar v Canada (Citizenship and Immigration)*, 2015 FC 812 (*Belahmar*) in support of her position.

[54] On the facts of this case, *Belahmar* is distinguishable. There, the medical report concluded and stated directly that the ability of that applicant to testify was compromised; it was likely that he would have difficulty remembering dates during his hearing: *Belahmar* at para 8. Had the RPD in *Belahmar* considered the medical report and used it when assessing credibility, it may well have affected the outcome. As previously stated, there is no such clear medical finding or statement in the Applicant’s psychological report. There is no basis upon which to conclude that the order in which the RAD wrote the Decision had any impact on the outcome.

[55] On the basis of the record, I am not persuaded that the RAD's analysis and treatment of the psychological report was unreasonable. The evidence in the record supports the RAD's findings.

IV. Conclusion

[56] The Federal Court of Appeal in *Siad v Canada (Secretary of State)*, 67 ACWS (3d) 978 at paragraph 24, [1997] 1 FC 608 (FCA) established the starting point for review of decisions based on credibility and the requirements that must be met by the decision-maker when rejecting a claim on grounds of credibility:

The Tribunal is uniquely situated to assess the credibility of a refugee claimant; credibility determinations, which lie within "the heartland of the discretion of triers of fact", are entitled to considerable deference upon judicial review and cannot be overturned unless they are perverse, capricious or made without regard to the evidence.

[57] While the RAD is entitled to considerable deference, it does not need to draw upon it as no reviewable errors were committed. The outcome and process fit comfortably together based on a review of the record and considering the evidence as a whole.

[58] The Decision is reasonable. The Applicant knows why the RAD arrived at the outcome it did and the process by which it arrived there. Whether or not the Court would have come to the same conclusion is not the issue. The *Dunsmuir* criteria of justification, transparency and intelligibility have been met.

[59] The Decision, and the credibility findings, were not made in a way that was perverse, capricious or without regard to the evidence.

[60] The application is dismissed.

[61] Neither party suggested a serious question of general importance exists on these facts.

JUDGMENT in IMM-5023-17

THIS COURT'S JUDGMENT is that:

1. The application is dismissed.
2. There is no serious question of general importance for certification.

"E. Susan Elliott"

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: IMM-5023-17

STYLE OF CAUSE: PAMELA BIRUNGI LUMALA v THE MINISTER OF
CITIZENSHIP AND IMMIGRATION

PLACE OF HEARING: TORONTO, ONTARIO

DATE OF HEARING: JUNE 25, 2018

JUDGMENT AND REASONS: ELLIOTT J.

DATED: MAY 31, 2019

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