

Federal Court



Cour fédérale

Date: 20191015

Docket: IMM-1510-18

Citation: 2019 FC 1294

Ottawa, Ontario, October 15, 2019

PRESENT: The Honourable Madam Justice Elliott

BETWEEN:

SWASTIKA KARKI

Applicant

And

**THE MINISTER OF CITIZENSHIP
AND IMMIGRATION**

Respondent

JUDGMENT AND REASONS

[1] This is the judicial review of a decision by the Refugee Appeal Division (the “RAD”) denying the refugee claim of Ms. Swastika Karki (the “Applicant”) on the basis that she lacked credibility. The Applicant argues that the RAD, in agreeing with the determination of the Refugee Protection Division (the “RPD”), erred both by not according her procedural fairness and making unreasonable credibility findings.

[2] For the reasons that follow, this application is dismissed.

I. **Background Facts**

[3] The Applicant is a citizen of Nepal where she was a social activist, journalist and host of a radio show on the Radio Nepalbani station. She interviewed politicians, human rights leaders and social activists on the radio, discussing politics and raising issues of corruption and other societal concerns. She was often critical of politicians.

[4] The Applicant supported the return of the monarchy to Nepal. In July 2015, she was harassed by two men at a bus stop who identified themselves as members of the Maoist party. They spat on the Applicant, verbally abused her and warned her to stop advocating for the return of the King.

[5] In November 2015, the same two men sexually assaulted the Applicant. The next morning she and her mother visited a doctor who examined her and verified that she had been raped. The doctor provided a medical booklet to the Applicant which contained the doctor's medical license number. The doctor noted in handwriting in the booklet that the Applicant had been physically and sexually abused "during [M]aoist insurgency by the rebels". She was advised to have a blood test and a pregnancy test and was released from the hospital.

[6] After being released, the Applicant and her mother filed a complaint with two police stations and informed various public interest organizations regarding the attack, including the Federation of Nepalese Journalists (the "FNJ"). The FNJ then issued a press release, condemning the attack on the Applicant and on journalists more generally.

[7] Fearing for her safety, the Applicant secured a temporary resident visa to Canada and fled Nepal on December 20, 2015. Her visa expired in June 2016.

[8] In August 2016, the Applicant learned—through a meeting with a paralegal—that her status had expired. She then consulted her current counsel and filed her refugee claim in September 2016.

II. The RPD Decision

[9] The RPD heard the Applicant's claim on March 15th and 24th, 2017. The panel's decision was released on May 24, 2017. It found that she was neither a convention refugee nor a person in need of protection.

[10] The RPD found the determinative issue was credibility. While a number of negative credibility findings were made, it will suffice to discuss three of them and the treatment of the psychiatric report by the RPD.

A. *The Medical Booklet*

[11] The Applicant's identity as a citizen of Nepal was accepted but the medical booklet she tendered in support of her allegation of sexual assault was found to be fabricated and no weight was assigned to it.

[12] Two other findings led to that conclusion. One was that the Maoist insurgency ended in 2006 which was "wholly at odds" with the 2015 entry in the booklet referring to Maoists. The

other was that the medical license number in the booklet was not assigned to the doctor who examined the Applicant and signed the booklet.

[13] These two problems together led the panel to find the credibility of the Applicant's claim to have been sexually assaulted was undermined as the medical booklet was fabricated.

B. *The FNJ Press Release*

[14] In addition, the RPD found the FNJ press release was fabricated as two of the names in the letterhead were misspelled: "Fedration" instead of Federation and "Neplese" instead of Nepalese. As the FNJ name had changed in 2008, the panel found that it defied credulity that those errors in the letterhead would have been allowed to exist for years.

[15] The RPD found that as the FNJ letter was fabricated, the Applicant had not told her station manager of the attack and he had not reported it to the FNJ. It also found that it was implausible that the FNJ would take the word of a radio station manager that an employee had been raped and on that basis proceed to issue a press release identifying the Applicant by name without contacting her to verify details or get permission to disclose her name.

[16] The RPD reviewed that the Applicant said that she had gone to the FNJ office to pick up the press release from the leader. The panel found that contrary to the documentary evidence that the FNJ provides follow-up, support and assistance to journalists and their families following an attack, the Applicant was not asked any questions and no follow-up or support was offered to her.

[17] The RPD then noted that when combined with the fraudulent medical booklet tendered in support of her attack, the fabricated FNJ letter led the panel to find that the attack on the Applicant did not occur. The panel found that this combination undermined her credibility and the entirety of her allegations.

C. *Recordings of Radio Interviews*

[18] Another significant finding was that the Applicant was unable to obtain recordings of her radio interviews with Maoist leaders. She claimed that the station manager would be exposed to danger if she told him she was in Canada. Her explanation for this was that there were Maoist spies everywhere and they could be in the radio station.

[19] The panel found the explanation unreasonable as it was speculative and no corroborative evidence had been provided to establish that allegation. The panel drew a negative inference as to whether the Applicant had in fact hosted her own political radio show.

D. *The Psychiatric Report*

[20] The Applicant had tendered a psychiatric report attesting to her PTSD, depression and anxiety. She asked the panel to take it into account when assessing her credibility. The RPD found that as it had disbelieved the essential elements of her claim, the doctor's report, which was based on the self-reporting of the Applicant, should be given little weight. The panel also noted that the psychiatric report did not indicate that the Applicant's testimony would be affected by her condition.

III. The RAD Decision

[21] The RAD confirmed the decision of the RPD.

[22] The RAD acknowledged that in *Canada (Citizenship and Immigration) v Huruglica*, 2016 FCA 93 the Federal Court of Appeal established that a review of the RPD decision was to be done by way of an independent assessment of the evidence that was before the RPD. A correctness standard would be applied by the RAD to the RPD's findings unless the RPD had enjoyed a meaningful advantage in the assessment and weighing of oral testimony.

[23] In determining that the Applicant was not credible, the RAD reviewed essentially the same documents and factors as had the RPD. It did not find that the RPD had enjoyed any advantage in the assessment of oral testimony.

A. *The Medical Booklet*

[24] The RAD noted the Applicant's submission that the RPD erred in finding that the description of the Maoist insurgency was at odds with the situation in Nepal in 2015, because it failed to demonstrate an appreciation for the fact that while the insurgency reached a peace agreement in 2006 members continued to be active and perpetuate violence.

[25] The RAD acknowledged the documentary evidence submitted by the Applicant which indicated that crimes continue to be committed by former Maoist combatants in parts of Nepal. The Applicant asked the RAD to find that describing the attackers as "Maoist insurgents" was not "wholly at odds" with the political climate in Nepal in 2015 as factions of the old Maoist insurgency were still operating.

[26] The RAD noted that the Applicant had not alleged that she was attacked by members of Maoist factions but rather by two men from the mainstream Maoist party. It also found that the RPD was not wrong to find that the reference in the medical document to a Maoist insurgency by rebels as being her attackers was anomalous to the National Documentation Package for Nepal. The RAD concluded that the anomaly undermined the authenticity of the medical document, the Applicant's credibility, and the credibility of her allegations.

[27] The fact that the name associated with the medical number in the booklet was not that of the doctor named in the booklet was found by the RAD to further undermine the evidence. The prevalence of fraudulent credentials in Nepal being used by individuals posing as doctors was found by the RAD to make the medical booklet less reliable rather than more credible.

B. *The FNJ Press Release*

[28] The RAD reviewed the RPD's analysis of the errors in the FNJ letterhead and considered the Applicant's explanation that the typographical errors may have been caused by name changes in 1995 and 2008. It also considered her argument that the RPD was speculating when it said it defied credulity that the letterhead could be wrong for at least seven years.

[29] The Applicant also submitted to the RAD that it was speculative for the RPD to find that the FNJ did not communicate with her directly. The FNJ is a private organization that commonly follows up with wronged journalists, but to follow up is not a policy nor is it required by law. She argued that it is an error to prejudice her claim based on the irregular conduct of a third party organization.

[30] The RAD did not accept the Applicant's arguments. It found that the misspelling of the organization's name in the letterhead undermined its authenticity, particularly as the word "Association" was removed from the name in 1995. That finding was reinforced by the other anomalies and the prevalence of fraudulent documents from Nepal.

C. *Recordings of Radio Interviews*

[31] The RAD reviewed both the RPD's findings and the Applicant's explanations for why she did not obtain recordings of her radio interviews: that she feared spies could be in the radio station and that she did not want anyone to know that she came to Canada in case the Maoists found out.

[32] The RAD considered the Applicant's submission that the RPD finding that her explanation was speculative and inadequate was a plausibility finding about the rationality of her subjective fear, and as such the psychiatric report had to be taken into consideration. That report confirmed she has PTSD and that she struggles with flashbacks, nightmares, anxiety and panic. She argued that contacting her former employer could trigger violence to her family or to her employer which is consistent with her high level of anxiety.

[33] The RAD stated that it "attach[ed] great importance to the recordings of the [Applicant's] alleged radio interviews with Maoist leaders in support of her allegations". It noted that this Court's jurisprudence has established that the Applicant bears the burden of proof to establish her claim and in doing so she must bring all the evidence she has to offer and believes is necessary to prove her claim.

[34] The RAD found that the Applicant provided no credible evidence that requesting the recordings would put anyone at risk of harm. The RAD noted that the Applicant had requested supporting documents from other organizations and provided them to the RPD with no apparent consequences. It found that this refuted her allegation that requesting recordings would put individuals at risk.

D. *The Psychiatric Report*

[35] The RAD found that the psychiatric report did not account for the Applicant's lack of effort to obtain the recordings. It noted the report said she was obsessed with persistent and intrusive thoughts about the rape and threats against her in Nepal. It also however indicated that her judgment, insight, and higher cortical functioning appeared to be within the normal range, which suggested to the RAD that she had the capacity to attempt to obtain corroborating evidence such as the radio interviews.

[36] The RAD considered the RPD's assessment of the psychiatric report as being based primarily on the Applicant's information and the acceptance of it by the psychiatrist. The RAD considered the Applicant's argument that the RPD had failed to take into account that her PTSD affected her perception of the objective world and confirmed her struggles with flashbacks, nightmares, anxiety and panic.

[37] The RAD accepted that the Applicant suffered from PTSD, Adjustment Disorder with Anxiety and Depression, and Panic Anxiety with some Agoraphobia as set out in the psychiatric report. It indicated that after reviewing all the testimony and evidence there were "significant anomalies" in the Applicant's evidence – such as the irregularities with the medical report and

the FNJ press release – that were not explained by the psychiatric report. It also found that the lack of effort to obtain the recordings could not be explained by or attributed to her psychiatric condition.

[38] The RAD noted from the recording of the hearing at the RPD that the Applicant had the ability to recall “a considerable amount of information from her past.” As the psychiatric report indicated that the Applicant’s flow of speech was expansive and she showed no problems expressing herself the RAD found that the report failed to account for her inconsistent or irregular evidence.

[39] The RAD also noted the psychiatric report did not indicate that the Applicant had any perceptual disorders. It stated that she was oriented to person, place, and time, alert, and her responses were coherent, although overly detailed, but not difficult to follow. On finding that there were anomalies in the Applicant’s evidence in significant areas which were extensive and not explained by the report the RAD gave little weight to the psychiatric report.

[40] The RAD concluded that although the Applicant alleged the RPD made unfounded plausibility findings and that she lacked subjective fear, the RPD findings regarding the Applicant’s credibility were thorough and based on the evidence. The RAD reached the same conclusion as the RPD and found that the RPD did not err in its assessment of the evidence or in its findings.

[41] The RAD concluded that the cumulative result of the anomalies it had noted in the Applicant’s evidence was that she lacked credibility, and the material events described in her Basis of Claim form and at her hearing did not occur as described. On a balance of probabilities,

she had not hosted a political radio show in Nepal and was not targeted or assaulted by Maoists. She was not threatened in Nepal because of her activism, journalism or gender and there was no serious possibility of persecution should she return to Nepal.

IV. **Issues**

[42] The Applicant raises two issues.

[43] One is that it was procedurally unfair of the RAD not to put to her their question as to why the station manager, or someone else, would not be able to obtain discreetly her radio recordings.

[44] The second issue is whether the RAD's assessment of the evidence was reasonable.

V. **Standard of Review**

[45] This Court reviews decision of the RAD when sitting on appeal from the RPD on the standard of reasonableness: *Huruglica* at paragraph 35.

[46] Both the RPD and the RAD found that much of the Applicant's evidence was not credible. The standard of review for this Court when reviewing credibility findings is also reasonableness: *Liang v Canada (Citizenship and Immigration)*, 2017 FC 1020 at paragraph 7.

[47] 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 paragraph 47 [*Dunsmuir*].

[48] 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 paragraph 16.

[49] The standard of review for matters of procedural fairness has long been correctness. Recently, Mr. Justice Rennie reviewed and refined the core principles of procedural fairness in *Canadian Pacific Railway Company v Canada (Attorney General)*, 2018 FCA 69 [*CPR*]. He concluded that whether there has been procedural fairness does not require a standard of review analysis but “a court must be satisfied that the right to procedural fairness has been met.” In that respect, the ultimate question is whether the Applicants knew the case to be met and had a full and fair chance to respond: *CPR* at paragraphs 49-50, 56.

[50] Procedural fairness review involves asking whether a fair and just process was followed having regard to all the circumstances, including the nature of the substantive rights involved and the consequences for an individual: *CPR* at 53 - 54.

[51] No deference is to be shown to the decision maker’s reasoning process when applying the correctness standard. The reviewing court undertakes its own analysis: *Dunsmuir v New Brunswick*, 2008 SCC 9 at paragraph 50.

VI. Analysis

[52] The Court of Appeal in *Siad v Canada (Secretary of State)*, [1997] 1 FC 608 established the starting point for the review of decisions based on credibility and, the requirements that must be met by the decision-maker when rejecting a claimant on the ground 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.

[53] An important indicator of credibility is the consistency with which a witness has told a particular story: (*Canada (Minister of Employment and Immigration v Dan-Ash)* (1988), 93 NR 33 (FCA).

[54] When a tribunal rejects a claim on the ground that the claimant is not credible, it must state that ground clearly: (*Ababio v Canada (Minister of Employment and Immigration)* (1988), FCJ No 250 (FCA)) and it must give reasons for the credibility finding: (*Armson v Canada (Minister of Employment and Immigration)*, [1989] FCJ No 800 (FCA).

[55] It is also important to remember that the credibility findings of the RAD, and of the RPD, are entitled to deference and should not be lightly interfered with as the Federal Court of Appeal has found that findings of fact and determinations of credibility fall within the heartland of the expertise of the RPD: *Giron v Canada (Minister of Employment and Immigration)* (1992), 143 NR 238 (FCA).

A. *The RAD process was procedurally fair to the Applicant*

[56] The Applicant says she was not put on notice by the RPD or the RAD about the credibility concerns surrounding her inability to obtain copies of the radio tapes. That was procedurally unfair to her as the RAD attached great importance to her inability to provide the tapes and she did not have a chance to address that concern.

[57] The Applicant says that had she been presented with such an opportunity, she would have provided the explanation which is detailed in the affidavit she submitted as part of her judicial review application.

[58] I am not persuaded the process was procedurally unfair. The issue of the Applicant's ability to obtain the recordings was not raised for the first time at the RAD. The RPD raised it with the Applicant at the hearing. The RPD decision at paragraph 17 indicates the reason provided by the Applicant for not obtaining the radio interview tapes:

The claimant testified that she was unable to get recordings of her alleged radio interviews with Maoist leaders because she did not want to have to tell her station manager that she was in Canada as this would expose him to danger and further, she didn't want anyone outside her family to know she went to Canada, lest the Maoists find out. When asked how making such a request would expose her station manager to danger, the claimant replied that there were Maoist spies everywhere and there could be spies in the radio station too who would see him getting copies of her tapes.

[59] In her affidavit, the Applicant said that neither the RAD nor the RPD asked her how the station manager might attract the attention of spies by trying to obtain the tape recordings. If they had asked, she would have elaborated that she had contacted the station manager for help gathering evidence and copies of the interviews but he was reluctant, hesitated and seemed

scared. He explained the process to her – that there was a protocol to follow – and he was scared that a technician would ask questions which would lead to word getting out that he was helping her in Canada.

[60] The Applicant could have provided this more fulsome answer to the RPD when it first asked why she was unable to obtain the interview tapes. Her failure to provide a complete answer, when she apparently had one available, cannot be laid at the feet of the RPD or the RAD. The issue was canvassed by the RPD and the Applicant answered incompletely. There is nothing procedurally unfair in that.

[61] The Applicant also says that the RAD's finding that she had not provided an explanation as to why the station manager could not have discreetly obtained the tapes was unfair, because she did not have an opportunity to provide the full explanation.

[62] The Applicant was permitted to tender a 17-page post-hearing submission to the RPD. In it, she said that she "would not want to approach the station manager to request the recordings of her interview for fear that it would come out that she was in Canada". That submission is directly contradicted by the statement in her affidavit where she said, with reference to the station manager, "I contacted him to ask if he could help me with getting evidence and copies of the interviews." Both statements cannot be true. As the first statement was the only one before the RAD that was the evidence and submission it had to consider.

[63] Obtaining the tapes of the radio interviews was important to substantiate the central element of the Applicant's claim. One of the interviews was of a Maoist leader who was displeased with her interview. Had she fully answered the original question about obtaining the

tapes – either during direct examination by the RPD or during follow-up questioning by her counsel – she could have allayed any concerns about whether it was possible to obtain the tapes. Failing to do so made it appear that she had provided her only answer.

[64] The Applicant knew the case to be met. She had a full and fair chance to respond. The process was procedurally fair to the Applicant.

B. *The RAD's assessment of the evidence was reasonable*

[65] The Applicant states that the RAD erred when it found that she said men from the “mainstream Maoist” party had attacked her. She points out that in her Basis of Claim form (BOC) she named the CPNUML, which is a party that engages in illegal and violent activity.

[66] The Applicant also submits that in her oral testimony she did not use the word “mainstream”, she simply referred to “Maoists” without referring to a particular political party. She states that Maoists is a term of common usage to describe those participating in violent and unlawful activities.

[67] A review of the narrative to the Applicant's BOC shows that she named the CPNUML when referring to one of the people she interviewed on the radio. She then stated that the CPNUML is not the same as the Maoist party.

[68] In her narrative, the Applicant refers to the two men who attacked her while she was waiting for the bus as being “Maoist cadres”. In her subsequent attendance at the police station to request their arrest, she described them as “two men from the Maoist party”. In addition, the

corroborative documents submitted by the Applicant including the assessment letter from the doctor at Canadian Centre for Victims of Torture, the press releases and many of the documents reporting attacks on journalists refer to the “Maoist Party”. They do not refer to the CPNUML.

[69] I conclude from the specific statements made by the Applicant and the corroborative documents she submitted that the RAD’s reference to the mainstream Maoist party was consistent with the evidence before it. It was reasonable based on the record.

[70] The same analysis applies to the Applicant’s argument that the reference in the medical booklet to Maoist insurgents attacking her is not “wholly at odds” with 2015 Nepal because there are still factions of Maoists operating outside of the law. The RAD found for the reasons just set out that the Applicant had referred to mainstream Maoists, not insurgents. This was a reasonable finding on the evidence.

[71] Regarding the two errors in the FNJ letterhead, the Applicant submits that the RAD made plausibility findings as to the editorial practices of Nepali newspapers without having any clear supporting evidence.

[72] I fail to see how two significant errors in the name of the FNJ, both made on the face of its letterhead, can be said to be either an editorial practice or a plausibility finding. The conclusion drawn by the RAD is not speculative, and does not involve impermissible inferences – the errors are apparent on the face of the document. They relate to the name of the organization. Common sense tells us that an organization would spell its own name correctly on official letterhead. The RAD concluded that the irregularities on the face of the FNJ letterhead undermined the authenticity of the press release it purported to issue and, undermined the

credibility of the Applicant and her allegations. The RAD finding in this respect is grounded in the evidence and on the record. It is reasonable.

[73] The Applicant also submits that the fact that the medical licence number did not belong to the doctor she saw may undermine the competence of the diagnosis but it does not alter the fact that the Applicant sought medical assistance after she was assaulted. She says that she did not know the doctor was fraudulent.

[74] The Applicant is urging the Court to take a different view of the effect of the fraudulent use of the medical number in the medical booklet. While there is another possible interpretation, it does not displace the RAD's interpretation. An equally valid interpretation is that the fraudulent medical number undermined the authenticity of the medical booklet, which includes the diagnosis that the Applicant was raped.

[75] The RAD determined that the Applicant lacked credibility as a result of the cumulative problems with her evidence. It found that the RPD did not err in its assessment of the evidence or its findings. While the Applicant disagrees with the RPD and the RAD findings and conclusions, I find on review of the record that the RAD findings are reasonable and are supported by the evidence.

[76] There were other credibility findings made by the RPD which the RAD confirmed but have not been reviewed in these reasons. For example, the Minister intervened on the basis that the Applicant had delayed in making her refugee claim after coming to Canada. The RPD and the RAD found the Applicant's reasons for not claiming were not credible largely because they

did not believe that she did not know anything about refugee protection when she arrived in Canada.

VII. **Conclusion**

[77] The RAD reasons are clear and the overall findings are well supported by the evidence. The Applicant has asked the Court to draw different conclusions from the evidence but the RAD findings are sustainable based on the evidence and the RAD is entitled to deference from the Court. There is no evidence that the credibility findings were perverse or capricious or made without regard to the evidence.

[78] When the Decision is considered as an organic whole, it is reasonable. It meets the *Dunsmuir* criteria of justification, transparency and intelligibility. The outcome falls within the range of possible, acceptable outcomes which are defensible on the facts and law.

[79] The application is dismissed.

[80] Neither party proposed a serious question of general importance for certification and none arises on these facts.

JUDGMENT in IMM-1510-18

THIS COURT'S JUDGMENT is that the application is dismissed. There is no question for certification.

"E. Susan Elliott"

Judge

FEDERAL COURT
SOLICITORS OF RECORD

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