Federal Court  Cour fédérale

Date: 20200226

Docket: IMM-3453-19

Citation: 2020 FC 310

Ottawa, Ontario, February 26, 2020

PRESENT: The Honourable Mr. Justice Brown

BETWEEN:

MANUELA FERNAND VELASCO CHAVARRO

Applicant

and

THE MINISTER OF IMMIGRATION, REFUGEES AND CITIZENSHIP

Respondent

JUDGMENT AND REASONS

I. Nature of the matter

[1] This is an application for judicial review of a decision by the Refugee Appeal Division [RAD] of the Immigration and Refugee Board of Canada, which dismissed the Applicant's appeal and confirmed a decision of the Refugee Protection Division [RPD] that the Applicant is neither a Convention refugee nor a person in need of protection pursuant to paragraph 111(1)(a) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [*IRPA*].

[2] Judicial review is granted because the RAD and the RPD applied the discredited doctrine of recent complaint which is predicated on the trope or stereotypical myth that all victims of sexual assault report the assault in a timely manner. This myth is not only demonstrably false, but has been legislated out of Canada's criminal law since 1983, has been rejected by this Court before, and in my respectful view should form no part of Canada's immigration law.

[3] While both the RAD and RPD must among other things assess the credibility and subjective fear of refugee claimants, neither may rely on the trope that all victims of sexual assault report the assault in a timely manner.

II. Facts

[4] The Applicant is a citizen of Columbia. She arrived in Canada on April, 2016 with a temporary resident visa [TRV] valid until October, 2016. In August, 2016 – four months later – she made her refugee claim on the basis that she feared persecution or harm in Columbia from members or supporters of the Revolutionary Armed Forces of Colombia [FARC].

[5] The Applicant had been sexually assaulted by FARC supporters. In addition, both she and her family members had been harassed by FARC supporters. As a result, she was forced to give up her job helping disadvantaged farmers in rural Columbia, which work had drawn the ire of FARC leading to the threats, harassment and the sexual assault.

[6] Specifically, her evidence was that she was abducted and sexually assaulted in October, 2015 by FARC supporters, after presenting an information session on behalf of SENA. SENA is

an Agricultural Management Center providing information to farming and vulnerable communities in Colombia. She said she was warned by the FARC members that her presence in the area was not welcome.

[7] FARC told her she was prohibited from providing further information to farmers and the vulnerable in the rural communities. The FARC supporters also warned her not to go to police.

[8] The Applicant went to the hospital three days after the sexual assault but did not disclose her sexual victimization to medical staff. Rather, she sought assistance for reasons related to a history of major depression and anxiety. It is noteworthy that while the RPD held this non-disclosure counted against her in terms of subjective fear, the RAD set this finding aside.

[9] Subsequent to the sexual assault, the Applicant was followed by the same people in November, 2015, and January, 2016. In addition, both her mother and aunt were harassed with threatening calls, presumably made by the same FARC supporters.

[10] The Applicant arrived in Canada in April, 2016 on a temporary visa and started to live with a host family. She did not reveal the sexual assault to them at the beginning, but eventually disclosed the sexual assault to them some 2 months after she started to live with them. At or about that time she learned of the possibility of making an application for refugee status in Canada.

[11] After finding a lawyer, meeting and receiving treatment with a therapist and social worker, and completing the necessary paperwork, and with her lawyer's assistance, she made her claim for refugee protection in August, 2016. This was 2 months after she revealed the sexual assault to her host family, and learned of the possibility of applying for refugee status.

[12] In a decision dated November 1, 2016, the RPD determined the Applicant was neither a Convention refugee nor a person in need of protection [RPD Decision]. In the opinion of the RPD, the determinative issue was credibility. The negative credibility assessment was based on three factors: (1) the Applicant provided inconsistent information as to when she made the decision to leave Columbia; (2) she did not disclose that she was sexually assaulted to medical staff in Columbia after the assault; (3) she delayed making a refugee claim in Canada for four months after her arrival.

[13] The Applicant appealed the RPD Decision to the RAD.

III. Decision under review

[14] The RAD dismissed the appeal and confirmed the RPD Decision in a decision dated May 7, 2019 [Decision]. The RAD found the RPD erred in finding that the Applicant's failure to disclose details of her sexual assault to medical staff negatively impacted her credibility. This adverse inference was set aside. The RAD upheld the RPD's two other credibility findings.

[15] Importantly the RAD criticised the Applicant for what it called "inaction" [the 2 month delay] on the Applicant's part in preparing and filing her claim, thus weakening her credibility

and her claim of subjective fear of persecution. The RAD also found that the inconsistent information she gave as to when she made the decision to leave Columbia rendered her "entire story not credible."

IV. Issues

[16] The Applicant submits a number of issues and sub-issues for determination. However, I will only deal with the issue of credibility and lack of subjective fear based on the 2 months taken by the Applicant to file her claim after learning of the possibility of making an inland refugee claim.

V. Standard of Review

[17] As to the applicable standard of review, it is common ground between the parties that the standard of review is reasonableness, and I agree. Reasonableness requires the reviewing court to pay respectful attention to the decision-maker: *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65, majority reasons by Chief Justice Wagner, at para 84 [*Vavilov*]. In assessing reasonableness, the Court must look at the reasoning process in terms of coherent and rational chain of analysis, and the outcome of the reasoning in terms of the legal and factual constraints facing the decision-maker: *Vavilov* at paras 83-86. The decision under review must be justified, intelligible and transparent: *Vavilov* at para 99. Judicial review is not a treasure hunt for errors: *Vavilov* at para 102. As pre-*Vavilov*, decisions must not be assessed against a standard of perfection, and a reasonableness review is not a "line-by-line treasure hunt for error": Vavilov paras 91 and 102.

VI. Analysis

[18] In my respectful view, the conclusion of the RAD and the RPD that the Applicant took too long to file her refugee claim is unreasonable. This conclusion relies on the discredited and stereotypical myth that all women who are victims of sexual assault react in the same manner and will report a sexual assault in a timely manner. This is a ancient but rejected stereotypical myth about victims of sexual assault known as the "doctrine of recent complaint."

[19] For the reasons that follow, I find this doctrine should form no part of Canada's immigration law. The doctrine of recent complaint was thoroughly discredited decades ago because it is demonstrably false, and because it is sexist being almost universally applied against female victims of sexual violence. It has been rejected by both the courts and Parliament in the context of criminal law. It has been denounced by this Court in the immigration context. It should not have been applied in this case. Moreover, the RAD was inconsistent in striking bases of the RPD's credibility assessment based on the recent complaint doctrine (her not reporting the sexual assault to medical staff in Columbia), but not striking a second basis for its credibility finding (alleged delay in disclosing the sexual assault to her host family and refugee authorities). Both findings were equally based on the discredited doctrine of recent complaint and must be struck.

[20] This Court has previously set aside as unreasonable a decision of the RPD based on the doctrine of recent complaint. I refer to the decision of Justice Gleason (as she then was) in *Rezmuves v Canada (Citizenship and Immigration)*, 2013 FC 973 [*Rezmuves*]:

> [36] Moreover, the Member's line of questioning evinces a sexist attitude that is out of place in any hearing, and most especially objectionable in a hearing before the RPD where a woman is testifying about incidents of alleged sexual assault and rape that have led her to seek protection in Canada.
>
> [37] The common law doctrine of recent complaint - under which a failure to report a sexual assault quickly was a factor that could be considered as undercutting a complainant's credibility – was abolished by statute in criminal matters in 1983 (*Criminal Code*, RSC 1985, c C-46 at s 275). The Law of Evidence in Canada notes, at §1.63, that this doctrine was "based on stereotypical myths [which] made it easy for the accused to undermine the testimony of the victim and to escape conviction". The Ontario Court of Appeal commented on the doctrine as follows in *R v WB* (2000), 49 OR (3d) 321 at paras 145 – 146, 134 OAC 1:
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> > The annulment of the law relating to recent complaint was a clear rejection by Parliament of the two assumptions underlying the common law doctrine. By repealing this judge-made rule, Parliament declared that it was wrong to suggest that complainants in sexual cases were inherently less trustworthy than complainants in other kinds of cases, and that it was wrong to assume that all victims of sexual assaults, whatever their age and whatever the circumstances of the assault, would make a timely complaint. Both assumptions reflected stereotypical notions which demeaned complainants (most of whom were female) and ignored the realities of human experience. It made no sense to suggest that all persons subjected to a traumatic event such as a sexual assault could be expected to react in the same way and make a timely complaint: *R v W(R)*, [1992] 2 SCR 122 at 136. Indeed, that assumption is now so obviously wrongheaded that it is difficult to believe that it was ever part of the accepted wisdom of the common law.

> By removing the doctrine of recent complaint, Parliament sought to eliminate a rule which treated complainants in sexual assault cases as second-class persons. In addition, Parliament sought to dispel an assumption which had a real potential to mislead the trier of fact and distort the search for the truth. The abrogation of the rule struck a blow for both equality and the truth-finding function of the criminal trial process.
>
> [38] The same stereotypical assumptions underlie the Member's line of questioning about what Mr. Resmuves believed and his conclusions regarding Ms. Resmuves' credibility.

[21] The context in which the doctrine of recent complaint was struck down was set out by Justice Major for the majority of the Supreme Court of Canada in *R. v. D.D.*, [2000] 2 SCR 275 per Major J. It is well worth repeating:

> *B. The Law in Relation to Timing of Disclosure*
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> 60 In medieval times, the opinion expressed in Dr. Marshall's evidence was contrary to our law. Authorities from as early as the 13th century reveal that the common law once contained an absolute requirement that victims of sexual abuse raise an immediate "hue and cry" in order for their appeal to be heard. An example is provided by the following archaic passage cited in *Wigmore on Evidence* (2nd ed. 1923), vol. III, at p. 764:
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> > When therefore a virgin has been so deflowered and overpowered, against the peace of the lord the king, forthwith and while the act is fresh she ought to repair with hue and cry to the neighboring vills and there display to honest men the injury done to her, the blood and her dress stained with blood, and the tearing of her dress; and so she ought to go to the provost of the hundred and to the serjeant of the lord the king and to the coroners and to the viscount and make her appeal at the first county court.
>
> By the end of the 1700s, this formal requirement had evolved into a factual presumption. See, e.g., *Hawkins' Pleas of the Crown*, where the author states: "It is a strong, but not a conclusive, presumption against a woman that she made no complaint in a

reasonable time after the fact" (cited by Hawkins J. in *R. v. Lillyman*, [1896] 2 Q.B. 167, at pp. 170-71).

61 Owing to the inflexibility of the common law, the notion of hue and cry persisted throughout most of the 20th century. See *Kribs v. The Queen*, 1960 CanLII 7 (SCC), [1960] S.C.R. 400, per *Fauteux* J., at p. 405:

> The principle is one of necessity. It is founded on factual presumptions which, in the normal course of events, naturally attach to the subsequent conduct of the prosecutrix shortly after the occurrence of the alleged acts of violence. One of these presumptions is that she is expected to complain upon the first reasonable opportunity, and the other, consequential thereto, is that if she fails to do so, her silence may naturally be taken as a virtual self-contradiction of her story.

This reasoning was followed in *Timm v. The Queen*, 1981 CanLII 207 (SCC), [1981] 2 S.C.R. 315.

62 Today and for some time, the rationale in *Kribs* has been repeatedly subjected to criticism, is not followed, and has been overruled. The *Report of the Federal/Provincial Task Force on Uniform Rules of Evidence* (1982), at p. 301, as cited by Sopinka, Lederman and Bryant, *supra*, at p. 322, states:

> The expectations of medieval England as to the reaction of an innocent victim of a sexual attack are no longer relevant. A victim may have a genuine complaint but delay making it because of such legitimate concerns as the prospect of embarrassment and humiliation, or the destruction of domestic or personal relationships. The delay may also be attributable to the youth or lack of knowledge of the complainant or to threats of reprisal from the accused. In contemporary society, there is no longer a logical connection between the genuineness of a complaint and the promptness with which it is made.

In response to this criticism, Parliament chose to abrogate the authority of *Kribs* and *Timm* by statute (see s. 275 of the *Criminal Code*, R.S.C., 1985, c. C-46).

63 Application of the mistake reflected in the early common law now constitutes reversible error. See *R. v. W. (R.)*, 1992 CanLII 56 (SCC), [1992] 2 S.C.R. 122, per McLachlin J. (as she then was) at p. 136:

> Finally, the Court of Appeal relied on the fact that neither of the older children was "aware or concerned that anything untoward occurred which is really the best test of the quality of the acts." This reference reveals reliance on the stereotypical but suspect view that the victims of sexual aggression are likely to report the acts, a stereotype which found expression in the now discounted doctrine of recent complaint. In fact, the literature suggests the converse may be true; victims of abuse often in fact do not disclose it, and if they do, it may not be until a substantial length of time has passed.

The significance of the complainant's failure to make a timely complaint must not be the subject of any presumptive adverse inference based upon now rejected stereotypical assumptions of how persons (particularly children) react to acts of sexual abuse: *R. v. M. (P.S.)* (1992), 1992 CanLII 2785 (ON CA), 77 C.C.C. (3d) 402 (Ont. C.A.), at pp. 408-9; *R. v. T.E.M.* (1996), 1996 ABCA 312 (CanLII), 187 A.R. 273 (C.A.).

C. *Appropriateness of a Judicial Instruction*

64 Given that the statement of principle expressed by Dr. Marshall reflects the current state of Canadian law, it could have and should have been included in the trial judge's instructions to the jury. As this would have effectively dispelled the possibility that the jury might engage in stereotypical reasoning, it was not necessary to inject the dangers of expert evidence into the trial.

65 A trial judge should recognize and so instruct a jury that there is no inviolable rule on how people who are the victims of trauma like a sexual assault will behave. Some will make an immediate complaint, some will delay in disclosing the abuse, while some will never disclose the abuse. Reasons for delay are many and at least include embarrassment, fear, guilt, or a lack of understanding and knowledge. In assessing the credibility of a complainant, the timing of the complaint is simply one circumstance to consider in the factual mosaic of a particular case. A delay in disclosure, standing alone, will never give rise to an adverse inference against the credibility of the complainant.

[22] Reverting to the case at bar, the RPD and RAD criticized the Applicant for the time taken to file her refugee claim, citing and relying upon her alleged “inaction”. I wish to note her delay was not the 4 months found by the two tribunals below. It was only a 2 month delay because before then she was not aware of her ability to claim refugee status. The evidence before the tribunals was that the Applicant did not disclose information about the sexual assault to her Canadian host family until she had been living with them for 2 months. This delay should have been excused by both tribunals on the grounds that different victims of sexual assault will react and report at different times.

[23] I note the *Chairperson Guidelines 4: Women Refugee Claimants Fearing Gender-Related Persecution*, effective date: November 13, 1996 [*Gender Guidelines*] do not address the need to eliminate the doctrine of recent complaint from refugee law to the same extent and for the reasons it has been eliminated from our criminal law.

[24] That said, the *Gender Guidelines* do address the issue of timely disclosure of sexual violence but from a different but much narrower perspective. The *Gender Guidelines* make specific allowance for women from societies where the preservation of one's virginity or marital dignity is the cultural norm. In such circumstances, the *Gender Guidelines* instruct that such women may be reluctant to disclose their experiences of sexual violence in order to keep their shame to themselves and not dishonour their family or community. In addition, the *Gender Guidelines* call for special consideration where a victim of sexual violence may be reluctant to testify. The *Gender Guidelines* state:

> D. Special Problems at Determination Hearings
>
> Women refugee claimants face special problems in demonstrating that their claims are credible and trustworthy. Some of the difficulties may arise because of cross-cultural misunderstandings. For example:
>
> 1. Women from societies where the preservation of one's virginity or marital dignity is the cultural norm may be reluctant to disclose their experiences of sexual violence in order to keep their "shame" to themselves and not dishonour their family or community.
>
> 2. Women from certain cultures where men do not share the details of their political, military or even social activities with their spouses, daughters or mothers may find themselves in a difficult situation when questioned about the experiences of their male relatives.
>
> Women refugee claimants who have suffered sexual violence may exhibit a pattern of symptoms referred to as Rape Trauma Syndrome, and may require extremely sensitive handling. Similarly, women who have been subjected to domestic violence may exhibit a pattern of symptoms referred to as Battered Woman Syndrome and may also be reluctant to testify. In some cases it will be appropriate to consider whether claimants should be allowed to have the option of providing their testimony outside the hearing room by affidavit or by videotape, or in front of members and refugee claims officers specifically trained in dealing with violence against women. Members should be familiar with the UNHCR Executive Committee Guidelines on the Protection of Refugee Women.
>
> [Emphasis added]

[25] While the *Gender Guidelines* apply to a restricted species of the reporting of sexual assault covered by the doctrine of recent complaint, in my view the doctrine of recent complaint should be expunged from immigration law. I note the *Gender Guidelines* were adopted in 1996. They have not been updated to reflect the current state of the law in terms of the doctrine of recent complaint.

[26] I also note the RAD appropriately set aside the RPD's holding that the Applicant's failure to report the sexual assault to medical staff in Columbia negatively affected her credibility. In this respect, the RAD's decision does not precisely rely upon the applicable provisions of the *Gender Guidelines*. I conclude the RAD understood its duty not to apply the doctrine of recent complaint in respect of that aspect of the case. For the same reasons, the RAD also should have rejected the application of the doctrine of recent complaint in relation to the time she took to disclose and then file her refugee application.

[27] I appreciate that subjective fear is and must remain one of several key components of a refugee claim. It remains true that unreasonable delay in accessing the refugee protection system is a relevant element in the assessment of the subjective fear of persecution, though not a decisive factor in itself: *Huerta v. Canada (Minister of Employment and Immigration),* [1993] FCJ No 271 (FCA), reasons for judgment Létourneau J; *Calderon Garcia v. Canada (Citizenship and Immigration)*, 2012 FC 412 per Near J (as he then was) at para 19; *Velez v Canada (Citizenship and Immigration),* 2010 FC 923 per Crampton J (as he then was) at para 28.

[28] However, the duty to assess subjective fear and unreasonable delay is displaced when the review becomes one of assessing the conduct of a victim of sexual assault against the sexist stereotype that all victims of sexual assault report on a timely basis as set out in the discredited doctrine of recent complaint.

[29] In my view, this case is an example of the insidious workings of this discredited doctrine. I use the word insidious because, and to their credit, the doctrine of recent complaint was not

expressly applied by either of the decision makers. I have no doubt the decisions below would have been different had the decision-makers put their minds to the fact that when dealing with sexual assault victims, the assumption of uniform timely reporting is a discredited myth, as counsel for the Applicant submitted.

[30] In the result, where once there were three reasons to doubt the credibility and subjective fear of the Applicant, now there is only one, namely that the Applicant provided inconsistent information as to when she made the decision to leave Columbia. While I appreciate this finding was stated to render the entire story not credible, the RAD nevertheless made other credibility findings. Thus, and with respect, it is not clear which credibility findings were determinative on the issue of credibility. It is not safe to allow the Decision to stand.

VII. Conclusion

[31] In summary, the reasons of the RAD do not display an internally coherent and rational chain of analysis that is justified in relation to the facts and law that constrain the decision-maker in relation to the discredited doctrine of recent complaint. Considering the Decision holistically and not as a treasure hunt for errors, and paying ‘respectful attention’ to the reasoning process and its outcome, I find the Decision is not justified, transparent, and intelligible. Therefore, this application for judicial review will be allowed.

VIII. Certified Question

[32] Neither party proposed a question of general importance, and none arises.

JUDGMENT in IMM-3453-19

THIS COURT'S JUDGMENT is that the application for judicial review is granted, the Decision is set aside, the matter is remanded to a differently constituted decision-maker for redetermination, no question is certified, and there is no order as to costs.

"Henry S. Brown"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-3453-19
STYLE OF CAUSE:	MANUELA FERNAND VELASCO CHAVARRO v THE MINISTER OF IMMIGRATION, REFUGEES AND CITIZENSHIP
PLACE OF HEARING:	TORONTO, ONTARIO
DATE OF HEARING:	FEBRUARY 19, 2020
JUDGMENT AND REASONS:	BROWN J.
DATED:	FEBRUARY 26, 2020

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