

Federal Court



Cour fédérale

Date: 20200930

Docket: IMM-5499-19

Citation: 2020 FC 940

Ottawa, Ontario, September 30, 2020

PRESENT: The Honourable Mr. Justice Favel

BETWEEN:

**FAZAAL SHINA
ROSE OROMAIT AAILA**

Applicants

and

**THE MINISTER OF CITIZENSHIP AND
IMMIGRATION**

Respondent

JUDGMENT AND REASONS

I. Overview

[1] This is an application for judicial review of a decision [Decision] of the Refugee Appeal Division [RAD] pursuant to s 72(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA]. The Decision, dated August 20, 2019, upheld a decision of the Refugee Protection

Division [RPD], which found that the Applicants were not Convention refugees or persons in need of protection.

[2] For the reasons below, I am dismissing the application for judicial review.

II. Background

A. *Facts*

[3] The Principal Applicant, Shina Fazaal, [PA] and her minor child [MA], are citizens of Uganda. They arrived in Canada in May 2014 and made a claim for refugee protection.

[4] There are two basis for the PA's refugee claim. The first is the PA's political activities as a member and volunteer of the Forum for Democratic Change [FDC]. The second is that the PA is a family member of an activist for lesbian, gay, bisexual, transgender, and queer [LGBTQ] issues in Uganda. The PA's brother is the LGBTQ activist. The refugee claim of the PA and the MA was joined with the claim of the PA's brother and his two children.

[5] The initial rejection of the claims of the PA and MA and her brother by the RPD occurred in September 2014. The claimants appealed the RPD decision to the RAD. The RAD separated the PA's and MA's claim from the PA's brother, found errors in the RPD decision and sent the claims back for re-determination. The RPD, on re-determination, ultimately accepted the brother's claim but denied the PA's and the MA's claim in February 2019.

[6] On the re-determination, the RPD rejected the PA's and the MA's claim for three reasons. The identity of the MA was found by the RPD to be an issue. The RPD also found credibility issues arising from the PA's story regarding a 2011 assault and an alleged targeting by the Ugandan authorities. Lastly, the RPD found a lack of objective evidence of risk based on the PA's brother's political involvement and family relationship as an LGBTQ advocate.

[7] The PA appealed the RPD's February 2019 decision and the RAD dismissed the appeal on August 20, 2019.

B. *The RAD Decision*

[8] The following is a summary of the RAD's findings:

- (1) The RPD should have assessed the brother's testimony and should not have ignored the evidence of more serious consequences faced by individuals with LGBTQ family members. However, after reviewing this evidence, the RAD found that it did not change any findings made by the RPD;
- (2) The RPD was correct in finding that the PA may experience mistreatment or discrimination as a family member of an LGBTQ person but, based on the PA's circumstances, it would not amount to persecution;
- (3) The RPD was correct in determining that the PA did not have a forward facing risk based on her membership in the FDC. The RAD found that the RPD considered the PA's psychological report and that the RPD's findings on credibility were correct;
- (4) The RPD erred in speculating that the PA would not continue her work with the FDC if she returned to Uganda;

- (5) The RPD was correct in concluding that the PA was not of interest to the police because of her membership in the FDC. The RAD found that the RPD acknowledged that certain FDC members may be at risk but correctly found that based on the PA's profile as a "grass-roots campaign worker" she would not face persecution; and
- (6) The MA was not at risk of harm or persecution because of her religious beliefs as a Christian.

[9] The RAD's findings in relation to the MA are not at issue on this judicial review as the challenges relate only to the PA's claims.

III. Issues

[10] The PA raises three issues:

- (1) What is the standard of review?
- (2) Did the RAD err in its consideration of the evidence relating to her risk as a family member of a known LGBTQ activist?
- (3) Did the RAD err in finding that the applicant's political activities for the FDC would not lead to her experiencing persecution?

[11] After reviewing the submissions and oral arguments of the parties, the Court will consider the following issues:

- (1) What is the applicable standard of review?

(2) Was the RAD's decision reasonable?

IV. Standard of Review

[12] In accordance with the Supreme Court's recent revision of the administrative law framework, the overall decision is to be presumptively reviewed on a reasonableness standard. I see no reason why this standard should be rebutted in this case since this is not a situation where a statute sets out a particular standard of review nor does it involve an exemption that would attract a standard of correctness (*Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 at paras 16–17).

[13] The parties agree that the applicable standard of review is that of reasonableness.

V. Analysis

A. *Was the RAD's decision reasonable?*

[14] The PA argues that the RAD decision was unreasonable because it failed to independently assess the objective evidence related to family members of LGBTQ activists and, in addition, the RAD incorrectly found that the PA's political activities would not lead to a serious possibility of persecution.

(1) Was there an independent assessment of the evidence?

[15] The PA submits that in relying on the RPD's findings rather than conducting its own analysis the RAD failed to conduct an independent assessment of the objective evidence. Specifically, the PA submits that the RAD ignored documentary evidence that described violence towards family members of LGBTQ persons in Uganda.

[16] The Respondent submits that an independent analysis does not preclude the RAD from confirming and relying on the RPD's findings. The Respondent points to sections of the RAD Decision that specifically references the evidence it reviewed in its analysis.

[17] In the Decision, the RAD noted several errors in the RPD's assessment of the evidence, including that the RPD ignored contradictory country condition evidence. At paras 21 to 23 of the decision the RAD pointed out the RPD's errors and did indeed conduct its own analysis, though still found that the PA was not at risk as she was not a similarly situated person as referenced in the country condition evidence.

[18] I am not persuaded that the RAD failed to independently assess the evidence. Rather, the Applicant failed to establish a link between the general documentary evidence and the Applicant's specific circumstances, a burden which was hers to satisfy (*Balogh v Canada (Citizenship and Immigration)*, 2016 FC 426 at para 19).

[19] Even after assessing and analyzing the brother's evidence at paras 25 and 26, the RAD nevertheless found that it did not provide sufficient grounds to rebut the RPD's findings. This was a reasonable finding to make.

(2) Was the possibility of persecution underestimated?

[20] The PA submits that the second error of the RAD occurred when it found that the PA's political activities with the FDC, as a low-level supporter, would not lead to a serious possibility of persecution. The PA points out that since the RAD accepted that there was an assault on the PA while she worked on an election campaign in 2011 and that the PA would continue to be politically active if she returned to Uganda, the RAD erred in not finding a serious possibility of persecution.

[21] The PA further submits that the RAD improperly elevated the threshold that she was required to meet, by requiring past persecution to illustrate future persecution. In support, the PA relies on *Salibian v Canada (Minister of Employment and Immigration)*, [1990] 3 FC 250 [Salibian]. The PA states that it was sufficient for her to have established a fear resulting from reprehensible acts or acts likely to be committed against members of a group to which she belongs.

[22] The Respondent submits that the PA is requesting that this Court re-weigh the evidence, which is not a basis for judicial review (*Meneses Arias v Canada (Minister of Citizenship)* 2009 FC 604 at para 21). The Respondent also states that the RAD evaluated the evidence before it in its entirety and in depth, including that the RAD found that there was no evidence that the PA's sister in Uganda was facing persecution because of their brother's activism.

[23] I am not persuaded by the PA's interpretation of *Salibian*. In *Salibian*, the Court stated the following at para 21:

In the case at bar, the Division misunderstood the nature of the burden the applicant had to meet and dismissed the application on the basis of a lack of evidence of personal persecution in the past. This conclusion is a twofold error; in order to claim Convention refugee status, there is no need to show either that the persecution was personal or that there was persecution in the past.

[Emphasis added]

[24] I do not agree that the RAD elevated the threshold that the PA was required to meet as submitted by the PA. The RAD did not dismiss the PA's claim "on the basis of lack of evidence of personal persecution in the past" (*Salibian*, para 21) but rather assessed and weighed the PA's evidence of her claims, her brother's testimony and the country condition evidence, including the contrary country condition evidence missed by the RPD. After undertaking this fresh assessment of the evidence, the RAD nevertheless found that the PA was not a similarly situated person. In other words, there was no link found between the claimed persecution and either her brother's involvement as a LGBTQ activist or the PA's involvement with the FDC. This was a reasonable finding to make based on the evidence before the RAD.

[25] Further, the RAD assessed the PA's claims and identified several inconsistencies in the evidence, such as the PA's claim of interactions with Ugandan authorities. The RAD found that the RPD assessed these inconsistencies in light of the psychological report about recall issues and vague testimony about the timing of the 2011 election and the cumulative effect of the inconsistencies supported the RPD's finding.

[26] “The weighing of evidence is at the heart of the RAD’s expertise” (*Csoka v Canada (Citizenship and Immigration)*, 2016 FC 1220 at para 12). The RAD, a specialized and knowledgeable tribunal, made an appropriate assessment of the evidence before it. I find its treatment of the evidence was reasonable.

VI. Conclusion

[27] The RAD’s decision is reasonable and its reasons are intelligible. The application for judicial review is dismissed. The parties have not raised any question for certification and no such question arises.

JUDGMENT in IMM-5499-19

THIS COURT'S JUDGMENT is that the application for judicial review is dismissed. There is no question of general importance for certification and none arises. There is no order as to costs.

"Paul Favel"

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: IMM-5499-19

STYLE OF CAUSE: FAZAAL SHINA, ROSE OROMAIT AAILA v THE
MINISTER OF CITIZENSHIP AND IMMIGRATION

PLACE OF HEARING: HELD BY VIDEOCONFERENCE BETWEEN
TORONTO, ONTARIO AND OTTAWA, ONTARIO

DATE OF HEARING: JULY 27, 2020

JUDGMENT AND REASONS: FAVEL J.

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