Federal Court  Cour fédérale

Date: 20210106

Docket: IMM-7709-19

Citation: 2021 FC 18

[ENGLISH TRANSLATION]

Ottawa, Ontario, January 6, 2021

PRESENT: The Honourable Mr. Justice Roy

BETWEEN:

MARCELINA LUTONADIO

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

[1] This is an application for judicial review of a decision of the Refugee Appeal Division [RAD], which confirmed the decision of the Refugee Protection Division [RPD] determining that the applicant is not a person in need of protection. This application for judicial review is made under section 72 of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA].

I. Facts

[2] The facts of this matter are very straightforward. The applicant is a citizen of Angola who came to Canada seeking refugee protection status. She alleges that following the death of her husband in November 2014, she was kidnapped in December 2014 and February 2015.

[3] According to the account in support of her claim, known as the Basis of Claim Form (BOC Form), she alleges that she was kidnapped [TRANSLATION] "by criminals sent by my husband's family". In November 2014 she was allegedly taken to some fields, where she was beaten to the point of unconsciousness. She states that the criminals went away believing her to be dead. She was found by farmers, however, who took her to a hospital, where her injuries were treated.

[4] The second kidnapping allegedly took place in February 2015, when the applicant was again kidnapped by criminals. These criminals allegedly took her far from the city and blindfolded her. In the morning, hearing nothing, she took off the blindfold and returned home. The applicant adds that her children also disappeared in February 2015 and that she has not found them.

[5] She had to leave Angola in September 2016, ending up in the United States, in Buffalo, where, as stated in her account, she waited [TRANSLATION] "to be able to come to Canada".

[6] As the only support for her claims, she provided a handwritten document entitled "Medical Report", which, as we will see, does not really have the qualities of a medical report. I note that the English text could be the version of a text written in Portuguese, which was also

adduced. While the applicant's departure from Angola allegedly took place on September 8, 2016, the Medical Report is dated November 14, 2018. Also submitted were the national identity cards of the applicant and her late husband. No other documentary evidence that might affect the account was presented.

II. Decision under review

[7] The reviewable decision is the RAD's decision. The RAD largely agreed with the RPD's determination that was appealed before the RAD. The applicant testified before the RPD, but the RAD indicated that it had listened to the recording of this testimony. Like the RPD, the RAD did not believe the applicant's story and found that the RPD was correct in concluding that the applicant had not credibly established that she needed to be protected from her deceased husband's family. Indeed, the decision is concerned only with the application of section 97 of the IRPA in this case.

[8] The applicant's testimony was generally characterized as "rambling" and lacking in clarity. It was not clear who the applicant even feared. The applicant mentioned the government, but also people who had allegedly told her that members of her husband's family had it in for her. She stated that her husband's family had never liked her; that was the real reason since she had apparently returned to the family all the property that had belonged to her husband.

[9] Both the RPD and the RAD found the allegations against her in-laws to be vague, since they were based at best on rumors heard at her husband's funeral, among other things. Neither the RPD nor the RAD understood what exactly motivated the applicant's in-laws to blame the

applicant when the autopsy performed on her former husband had found that he had died from a heart attack.

[10] The RAD also criticized the Medical Report, sharing the RPD's opinion about it. At face value, the document could not have any probative value according to the RAD because it was handwritten, bore no letterhead, did not give a diagnosis, treatment or medical prescription, and merely reported the facts related by the applicant and on which she relied in her refugee protection claim. In other words, it merely represents the applicant's version of the events that apparently landed her in hospital. The RAD also noted that this report was not accompanied by any identification of its author. Yet the objective evidence suggests that the national identity card has been available in Angola for 15 years. And both the applicant's card and that of her late husband were produced. At the very least, if a copy identifying the author of the document through the author's national identity card had been produced, it could have helped corroborate the identity of that person. In these circumstances, the RAD found that, on a balance of probabilities, the Medical Report was not an authentic document.

[11] Both the RPD and the RAD noted that the alleged disappearance of the applicant's children was not supported by any evidence or explanation other than a vague suggestion that they had been kidnapped. Such general allegations must be explainable. Yet no evidence was presented to establish the existence of the children, their disappearance and the efforts made to find them, and how it was possible to try and find them during a 19-month period (between February 2015 and September 2016, when the applicant left Angola for the United States). Additionally, the SAR noted that the evidence regarding the children in the BOC Form was weak

to say the least. The BOC Form identified the son by a name and with a given date of birth, while the immigration forms identified him in a somewhat different way, but especially as having been born eight years later than what it says in the BOC Form. Similarly, the BOC Form identified the applicant's daughter by a name that was not the same as the one on the immigration form. The RAD found that the absence of independent evidence establishing the existence and identity of the applicant's children contributed to undermining the credibility of her account.

[12] There were also some omissions that the RAD considered to be significant. The applicant testified at the hearing before the RPD that complaints regarding the alleged two kidnappings had been filed with the police. However, no police report was provided. According to her testimony, it appears that she did not follow up with the police. The RPD asked the applicant directly why she had not obtained a copy of the police reports, but the response did not satisfy the RPD and the RAD. Indeed, she simply testified that those who had filed the complaint had not returned to the police and that, for her part, she had not succeeded in tracking down the women who, she alleges, filed the complaint about the November 2014 kidnapping with the police.

[13] The RPD noted that the applicant remained in Angola for 19 months after the second incident (February 2015). Surprisingly, no evidence was presented in this regard.

[14] The delay in leaving Angola was also noted. While it would be reasonable to accept that the applicant would not leave her country of origin because she was looking for her missing children, the applicant would still have had to present evidence in this regard, which she did not

do. Without being conclusive, these are other factors which, taken together, make the applicant's version less than persuasive.

[15] The RAD reached its conclusion in paragraph 36 of its decision. I reproduce it here:

> [36] I agree with the Appellant that refugee applicants are presumed to tell the truth. This is a presumption rebuttable by the Appellant's lack of credibility. I find that the accumulation of findings about vague testimony, inconsistencies and omissions and the absence of corroborative evidence regarding crucial elements of the Appellant's claim, even though they may be insufficient when taken individually or in isolation, cumulatively support a negative conclusion about her credibility. This negative credibility conclusion is reinforced by my finding that the medical report is not authentic and that the Appellant's delay in leaving Angola and failure to claim protection in the United States is behaviour incompatible with a fear of harm.

[16] Having concluded that the applicant, and therefore, her account, lacked credibility, the RAD, relying on *Ismaili v Canada (Citizenship and Immigration)*, 2014 CF 84, and *Al-Abayechi v Canada (Citizenship and Immigration)*, 2018 FC 360, found that it was not necessary to conduct a more detailed analysis under section 97 of the IRPA.

III. Arguments and discussion

[17] In her memorandum of facts and law, the applicant alleges a breach of procedural fairness because the RAD's written decision was rendered in English. However, neither at the hearing of this case, nor in the memorandum of facts and law, was this argument explained. In fact, the Court asked counsel for the applicant at the hearing whether she had any arguments to make. She made no such argument, nor did she file any authorities to support this claim. In fact, the record does not show whether a request for translation was even made. At the hearing,

counsel for the applicant stated that such a request was not made. In the circumstances, it seems to me that the argument was abandoned for all intents and purposes, especially as the respondent presented authorities disputing the merits of such an argument, authorities which were not challenged by the applicant (*Tas v Canada (Citizenship and Immigration)*, 2013 FC 281, paras 19 to 21; *Musa v Canada (Citizenship and Immigration*), 2012 FC 298, paras 11 to 15).

[18] The other argument made by the applicant is that the RAD's decision was unreasonable. In my opinion, the RAD's decision has all the qualities of reasonableness.

[19] The reviewing court has to examine the decision as a whole and seek to determine whether the reasons given are reasonable. Suffice it to recall paragraph 99 of *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 [*Vavilov*], where the Supreme Court developed the standard to be applied when the reasonableness of a decision is challenged:

> [99] A reviewing court must develop an understanding of the decision maker's reasoning process in order to determine whether the decision as a whole is reasonable. To make this determination, the reviewing court asks whether the decision bears the hallmarks of reasonableness — justification, transparency and intelligibility — and whether it is justified in relation to the relevant factual and legal constraints that bear on the decision: *Dunsmuir*, at paras. 47 and 74; *Catalyst*, at para. 13.

In addition, the burden is naturally on the party arguing unreasonableness, and the reviewing court will have to look for sufficiently serious shortcomings such that the decision cannot be said to exhibit the requisite degree of justification, intelligibility and transparency (*Vavilov*, para 100).

[20] Fundamental flaws are found when there is a failure of rationality internal to the reasoning process of the administrative tribunal or when the decision is untenable in light of the relevant factual and legal constraints that bear on it. Finally, it is important to note that the Supreme Court maintains that the reviewing court must respect the specialized expertise of administrative decision makers. The question to ask is not how the Court would have decided, but rather whether the applicant has demonstrated that the decision is unreasonable. As held in paragraph 75 of *Vavilov*, "reasonableness review finds its starting point in judicial restraint and respects the distinct role of administrative decision makers".

[21] I have no doubt that the RAD's decision has the qualities of reasonableness, and the application for judicial review must therefore be dismissed.

[22] In fact, the RAD did review the evidence filed by the applicant before the RPD. I can only note that this evidence was quite flimsy. In fact, it comes down to the testimony of an applicant who is unable to support that testimony in any way. It is certainly true that an account of tragic incidents can be enough. But this account still has to be precise so as to satisfy the test of the balance of probabilities. It is only normal for a trier of fact to want details. However, here the questioning of the applicant before the RPD merely created virtually gaping holes in an already short account.

[23] The applicant produced a medical report that was deficient in form and whose content did not rise to what is expected from a medical report. Instead it was a misguided attempt to repeat part of the applicant's version of the facts and it could only have been prepared by her. The

applicant argued in this Court that the RAD should have contacted the person posing as a physician to conduct its own investigation. I do not share the opinion given in *Paxi v Canada (Citizenship and Immigration)*, 2016 FC 905 [*Paxi*], that "[f]or the Board to take issue with the authenticity of the document yet make no further inquiries despite having the appropriate contact information to do so is a reviewable error" (para 52). Instead, I share the opinion of my colleague Justice Peter Annis in *Mohamed v Canada (Citizenship and Immigration)*, 2019 FC 1537, who disagreed with *Paxi*. He also wrote in paragraphs 87 to 89:

> [87] With respect, I understand that authenticity is a step required to be determined before a decision-maker may rely upon the contents of the document itself as being authentic, particularly in a world where technology has made forging documents considerably more problematic.
>
> [88] More to the point however, I disagree that an administrative tribunal has an obligation to contact a witness to obtain information. This is not its role. The onus rests with the Applicant to bring forward evidence it intends to rely upon and in doing so, always to put the best foot forward. It is not up to the RPD to chase down evidence from a witness to be satisfied that the document is authentic and that a person exists who has sworn to the truth of its contents before someone authorized to confirm that fact. This onus rests with the Applicant who should provide the necessary information authenticating the author and the document.
>
> [89] Nor is it clear how the Member would conduct the telephone interview. The Court in *Paxi* indicates that it would only be for the purpose of authentication, but once in conversation with the witness, it would be expected that the Member would proceed with the normal course of questioning the individual about the contents of the letter and all related matters going to its reliability, including establishing the identity of the witness. Such issues as administering the oath, how the record would be maintained, the nature of the questions - which could require some degree of a form of cross examination, with follow-up by the Applicant as is normally conducted by the Member - or how the conversation could occur without the Applicant being present, also come into play. In essence, it would require a further formal hearing, which cannot be conducted by the Member phoning witnesses for obtaining information.

[24] As noted earlier, it appears that the national identity card is widespread in Angola, as evidenced by the record, which includes the identity cards of the applicant and her late husband; this would have made it possible, at the very least, to help identify the author of the document. No such evidence was tendered.

[25] This testimony, which lacks credibility, could have been improved had there been independent evidence to support some of the allegations made. After all, the applicant did not have to leave her country of origin in great haste (she remained in Angola for 19 months), and she was apparently able to get a medical report in 2018. It is therefore difficult to understand why complaints to the local police could not be provided or why documentary evidence could not establish the existence of the children who allegedly disappeared in 2015. Such evidence was not provided, leaving us with nothing but the applicant’s vague, rambling testimony.

[26] These findings were made by both the RPD and the RAD. This is an indication of the justification, transparency and intelligibility of the reasons, which reveal no inconsistency or failure of rationality internal to the reasoning process and which have not been demonstrated to be untenable in light of the relevant factual and legal constraints.

[27] It follows that the application for judicial review must be dismissed. The parties agree that there is no serious question of general importance here that would cause a question to be certified. The Court shares that view.

JUDGMENT in IMM-7709-19

THIS COURT ORDERS as follows:

1. The application for judicial review is dismissed.

2. No question has been suggested as requiring certification, and none is certified.

"Yvan Roy"
Judge

Certified true translation
Johanna Kratz

FEDERAL COURT

SOLICITORS OF RECORD

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