Federal Court Cour fédérale

Date: 20210121

Docket: IMM-441-20

Citation: 2021 FC 72

Toronto, Ontario, January 21, 2021

PRESENT: Mr. Justice Alan Diner

BETWEEN:

KULWINDER KAUR HUNDAL,
NIMRIT KAUR HUNDAL,
SIRTAJ SINGH HUNDAL

Applicants

and

THE MINISTER OF CITIZENSHIP
& IMMIGRATION

Respondent

JUDGMENT AND REASONS

[1] This is an Application for judicial review of a decision from the Refugee Appeal Division ("RAD"), which set aside a decision from the Refugee Protection Division ("RPD") finding the Applicants were Convention refugees. The RAD substituted its own findings and rejected the Applicants' claim for asylum based on credibility. In doing so, I find that the RAD erred by failing to consider whether it was required to hold a hearing, and as a result I will grant this

Application. Before explaining the error of law made by the RAD, a brief summary of the facts follows.

I. Background

[2] The Principal Applicant and her two children (collectively, the Applicants) are citizens of India. The Applicants fear harm from the Principal Applicant's husband, whom she married in 2001, claiming he became physically and sexually abusive before they left India.

[3] The Applicants moved from India to the United Kingdom in 2004. They lived with the Principal Applicant's brother until March 2009, when UK authorities removed them to India due to their lack of proper immigration status. Upon her return to India, the Principal Applicant reconciled with her husband, and the Applicants moved in with him and his parents. The Principal Applicant claims that shortly after the reconciliation, the abuse resumed. She claims she was forced to perform household chores without rest and was sexually assaulted on multiple occasions. The Applicants fled to Canada with the help of an agent, arriving in September 2015, using false identities. They claimed refugee status in June 2017.

[4] On July 18, 2017, the Minister filed a notice of intent to participate in person before the RPD, without indicating any particular issues. The Minister withdrew the notice on August 24, 2017 – the day of the RPD hearing. During that hearing, the RPD member learned that the Principal Applicant had lived in the UK from 2004 to 2009 under a false identity. The RPD member adjourned the hearing and informed the Minister. On September 21, 2017, the Minister reinstated his notice of intent to participate, without indicating particulars. The hearing resumed

on June 20, 2018. The representative for the Minister appeared before the RPD a second time, but, as had been the case nine months prior, only informed the tribunal that the Minister was again withdrawing the intervention.

[5] In June 2018, the RPD rendered a positive decision for the Applicants (“RPD Decision”). It found the Principal Applicant’s testimony regarding past abuse, as well as forward-looking abuse, credible. The RPD stated in its oral reasons:

> With respect to credibility, overall I found the principle claimant to be a credible witness and believe what she has alleged in support of her claim. With the exception of a few minor discrepancies noted above she testified in a straightforward manner and there were no material inconsistencies in her testimony or contradictions between her testimony and the other evidence before me.
>
> On the basis of her reliable testimony, I find that the claimant has established that her husband and her husband's friend repeatedly physically and sexually assaulted her; that her husband threatened to find and harm her if she left the marital home, and that her in-laws and her own relatives disowned her after her arranged marriage.
>
> The available country evidence in the NDP establishes that there's an objective basis for the claimant's fear of persecution in India as a victim of gender-based violence. According to response to information request NDP 5.11 sources report that violence against women in India has increased.
>
> (Certified Tribunal Record [CTR] at 126)

[6] The RPD further found that the Applicants had no viable Internal Flight Alternative because of the difficulties the Principal Applicant would face as a single mother in India without family support. The Minister appealed to the RAD.

II. Decision Under Review

[7] The Minister submitted new evidence in his appeal to the RAD. This new evidence included previous documents relating to false identities that the Applicants had used in the UK and in a prior Canadian visa application, as well as evidence that the Principal Applicant had worked as a beautician in the UK without authorization. The Minister claimed that the RPD ought to have examined whether the Principal Applicant was excluded from Canada by virtue of Article 1F(b) of the *Convention Relating to the Status of Refugees*, 28 July 1951, 189 UNTS 137 (entered into force 22 April 1954) [*Convention*] in light of crimes she may have committed before arriving in Canada. Such a finding would have excluded the Applicants under section 98 of Canada's *Immigration and Refugee Protection Act*, SC 2001, c 27 [*IRPA*].

[8] On December 16, 2019, the RAD reversed the RPD's decision and found that the Applicants were neither Convention refugees nor persons in need of protection ("RAD Decision"), holding credibility to be the determinative issue.

[9] First, it held the RPD failed to explore the reasons for which it took the Principal Applicant years to claim asylum – living under false identities for five years in the UK from 2004 to 2009, and for two years in Canada from September 2015 to June 2017, before filing the claim. The RAD found that the delay undermined the Principal Applicant's claim of abuse, and that the RPD had failed to consider this in its Decision.

[10] Second, the RAD noted that the Principal Applicant's Basis of Claim Form made no mention of the reason for her children's refugee protection claim, nor that their father had also abused them. The omission raised further credibility concerns for the RAD.

[11] Third, the RAD drew an adverse inference from the Principal Applicant's unclear account of her financial situation, in particular regarding who assisted with finances to fund her and her family's travels, as well as their first two years in Canada.

[12] The RAD also made adverse findings from new evidence presented by the Minister. It found that, while the Principal Applicant had testified that her departure from the UK stemmed from a hope of reconciliation with her husband, an e-mail indicated she had actually been ordered removed from the country by UK immigration authorities. In addition, despite her testimony before the RPD that she had not worked outside her brother's home in the UK, that same e-mail indicated that when the Principal Applicant was intercepted at Heathrow International Airport she admitted to working as a beautician in the country.

[13] Although the RAD noted that its credibility concerns relating to the new evidence were not determinative, they, "cumulatively with the other credibility problems, render[ed] [her] allegations unworthy of belief". The RAD was not satisfied that her allegations of mistreatment in India were substantiated. On this basis, the RAD reversed the RPD's determination of refugee status.

[14] Finally, although the Minister had also contended that the RPD erred by failing to conduct an exclusion analysis under Article 1F(b) of the *Convention* due to false identities and improperly removing her children from India, the RAD found the Applicants were not excluded on the evidence presented.

III. Analysis

[15] The Applicants raise two main issues in this Application. They first argue that the RAD unfairly accepted new evidence on the issue of exclusion under the *Convention* because the Minister had twice withdrawn his intention to intervene before the RPD. However, as the RAD ruled against any exclusion finding, instead substituting its determination only on credibility grounds, I will focus on the second issue that the Applicants raise: that the RAD erred by admitting new evidence that raised a serious credibility issue without considering whether to convene an oral hearing under *IRPA* subsection 110(6). The Minister argues in response that the legislation does not require a hearing, and that the RAD's credibility findings were reasonable.

[16] Both parties agree, as do I, that the substance of a RAD decision attracts a reasonableness standard of review: *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 at para 23 [*Vavilov*]; *AB v Canada (Citizenship and Immigration)*, 2020 FC 915 at para 14. Ultimately, the key issue before me, given the reversal on credibility, is whether the RAD's failure to consider exercising its discretion to hold a hearing was reasonable.

[17] The RAD has an obligation to conduct its own analysis of the refugee claim before it, while focusing on errors identified by the appellant: *Fatime v Canada (Citizenship and*

Immigration), 2020 FC 594 at para 19 [*Fatime*]; *Canada (Citizenship and Immigration) v Huruglica*, 2016 FCA 93 at para 103 [*Huruglica*]. This engenders a correctness review of the RPD's decision (*Kreishan v Canada (Citizenship and Immigration)*, 2019 FCA 223 at paras 43-44; *Huruglica* at para 103). In so doing, the RAD must reach its own conclusions supported by its own internally coherent and rational justification, which must then pass muster on reasonableness review (*Fatime* at paras 19, 21; *Vavilov* at para 85). The RAD does not meet that standard if its decision does not respond to the central issues raised in a transparent and intelligible manner (*Gomes v Canada (Citizenship and Immigration)*, 2020 FC 506 at para 22).

[18] In most circumstances, appeals before the RAD proceed without a hearing in light of the record that was before the RPD (*IRPA*, s 110(3)). The person who is the subject of an appeal can only submit new evidence if it arose after the rejection of a claim or where it was unavailable at the time of the RPD hearing, whereas the RAD may consider any new evidence from the Minister (*IRPA*, ss 110(3)-(5); *Huruglica* at para 56).

[19] Where there is documentary evidence that (i) raises a serious issue with respect to the credibility of the claimant, (ii) is central to the decision on a refugee claim, and (iii) if accepted, would be determinative of the claim, the RAD may exercise discretion to hold a hearing (*IRPA*, s 110(6)). That said, a hearing is not granted simply because the RAD accepts new evidence (*Canada (Citizenship and Immigration) v Singh*, 2016 FCA 96 at para 71).

[20] I note that, here, the RAD accepted new evidence from the Minister that directly contradicted key RPD findings, including the finding that the Principal Applicant was forthright

and credible with respect to her abuse in India and status in the UK. She relies on *Zhuo v Canada (Minister of Citizenship and Immigration)*, 2015 FC 911 [*Zhuo*] to support her argument that the RAD is obliged to hold a hearing where the statutory criteria under *IRPA*'s subsection 110(6) are met, regardless of whether one was requested.

[21] In *Zhuo*, the RPD denied the refugee claim, a decision the RAD upheld based on new evidence submitted by the Minister that negatively affected the claimant's credibility. Justice O'Reilly noted that, in his view, "an oral hearing [would] generally be required where the statutory criteria have been satisfied" (at para 9). He further held that, while the RAD retained discretion to hold a hearing under subsection 110(6), it would need to exercise that discretion reasonably in the circumstances (*Zhuo* at para 11). Not exercising that discretion simply because neither party requested a hearing did not meet that threshold.

[22] Other cases have reached similar outcomes. For example, in *Tchangoue v Canada (Minister of Citizenship and Immigration)*, 2016 FC 334 [*Tchangoue*], the RAD accepted new evidence from a refugee claimant, but upheld negative credibility findings made by the RPD without convening a hearing. The RAD gave the evidence little weight due to concerns of its authenticity. In its reasons, the RAD did not conduct an analysis under *IRPA* subsection 110(6) to determine whether it should hold a hearing. Justice Roussel found that the RAD unreasonably failed to hold an oral hearing to allow the appellant to address authenticity issues with the new evidence (*Tchangoue* at para 17). Justice Roussel deemed it a reviewable error for the RAD not to have conducted a meaningful analysis under subsection 110(6) (*Tchangoue* at para 18).

[23] The key question in this Application, then, is how the RAD approached and exercised its discretion to hold a hearing, and whether its decision on this point was justified and transparent, and thus reasonable (*Vavilov* at paras 15, 127-128). Given that the Minister's new evidence raised significant credibility concerns about the Applicants' claim, and that the RAD failed to address subsection 110(6) altogether, its Decision lacked both justification and transparency.

[24] I recognize that the RAD allows an appellant and the Minister to request a hearing under the *Refugee Appeal Division Rules*, SOR/2012-257, which must be done in writing with a supporting memorandum (ss 3(3)(d)(ii), 3(3)(g), 4(2)(e), 9(2)(d); *Horvath v Canada (Citizenship and Immigration)*, 2018 FC 147 at para 18 [*Horvath*]). I also note that *IRPA* places no burden on either party to request or satisfy the RAD that an oral hearing should occur, and that the onus to address the discretion rests with the RAD (*Horvath* at para 18; *Zhuo* at para 11).

[25] In this case, however, the Minister/appellant did request a hearing, writing in its legal arguments to the RAD:

> The Minister requests that the RAD hold a hearing to address the issue of her identity, credibility and exclusion. If the RAD decides to not hold a hearing, the RAD should set aside the determination of the RPD that the Respondents are Convention refugees and refer it back to the Refugee Protection Division for re-determination.
>
> (CTR at p 33)

[26] Despite this request from the appellant (the Minister), the RAD failed to make any reference to *IRPA* subsection 110(6) in the RAD Decision, and failed to discuss whether it should have held a hearing. The only mention of a hearing was a statement that the Principal Applicant did not request one (RAD Decision at para 7). Without addressing one of the few

provisions on the nature of the appeal when overturning the RPD and substituting its own decision, the RAD conceals the basis on which this Court might defer to the RAD's choice of appeal procedure. While a tribunal's interpretation of its home statute generally attracts a deferential, reasonableness review (*Vavilov* at para 25), deference is not warranted in cases where the tribunal failed to engage with legislation where there was a duty to do so.

[27] I recognize that the RAD indicated the inconsistencies in the new evidence were not determinative in and of themselves, but only so when viewed in concert with other credibility issues. However, there is no doubt that the RAD placed significant weight on the new evidence in its analysis. Indeed, the RAD wrote in a subtitle, preceding paragraph 27 of the RAD Decision, that the new evidence "further undermines the credibility" of the Principal Applicant.

[28] If these grounds did not warrant an oral hearing, which by all appearances they did, at the very least they warranted an assessment of whether a hearing was required (see *Mofreh v Canada (Immigration, Refugees and Citizenship)*, 2019 FC 97 at paras 26-27). As Justice O'Reilly found in *Zhuo*, a case where neither party requested a hearing, the "onus rests with the RAD to consider and apply the statutory criteria [under *IRPA* subsection 110(6)] reasonably" (at para 11). This rings particularly true in rare instances, such as this, where the RAD overturns positive credibility findings by the RPD. Such circumstances demand both scrupulous reasoning and clear justification, both of which were lacking here, **particularly** in light of the Minister/appellant's request for a hearing, which went unaddressed.

IV. Conclusion

[29] The RAD erred by failing to address the Minister's request to hold an oral hearing, and thus engage with its discretion under *IRPA*'s subsection 110(6). I will thus grant this Application for judicial review. The parties propose no question of general importance for certification, and I agree that none arises.

JUDGMENT in IMM-441-20

THIS COURT'S JUDGMENT is that:

1. The application is allowed and the matter is remitted to the RAD for redetermination.

2. No questions for certification were argued and I agree none arise.

3. There is no award as to costs.

"Alan S. Diner"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-441-20
STYLE OF CAUSE:	HUNDAL ET AL v THE MINISTER OF CITIZENSHIP & IMMIGRATION

HEARING HELD BY VIDEOCONFERENCE ON JANUARY 13, 2021 FROM TORONTO, ONTARIO (COURT) AND VANCOUVER, BRITISH COLUMBIA (PARTIES)

JUDGMENT AND REASONS:	DINER J.
DATED:	JANUARY 21, 2021

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