Federal Court  Cour fédérale

Date: 20211013

Docket: IMM-5385-18

Citation: 2021 FC 1066

Ottawa, Ontario, October 13, 2021

PRESENT: The Honourable Mr. Justice Henry S. Brown

BETWEEN:

RUTH CHITSINDE

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Nature of the matter

[1] This is an application for judicial review of a decision by the Refugee Protection Division [RPD] of the Immigration and Refugee Board. The RPD determined the Applicant is neither a Convention refugee nor a person in need of protection pursuant to section 96 and section 97(1) of the *Immigration and Refugee Protection Act*, SC 2001, c. 27 [*IRPA*] [Decision].

II. Facts

[2] The Applicant is a 29-year old citizen of Zimbabwe.

[3] In her Basis of Claim [BOC] she says she sought refugee protection because she was raped by a national politician from the ruling party [the politician]. The politician held a senior position in the national government.

[4] The Applicant was interested in discussing business opportunities, and they met on a few occasions without incident. However, on the last occasion, the politician forced himself onto the Applicant and sexually assaulted her. He threatened she would “disappear” if she ever reported the rape to police. Based on this threat, the Applicant never reported the incident to police nor did she seek or receive medical treatment.

[5] Several months later, the politician called the Applicant and asked if she would be “a problem” for him, to which she responded “no”. She did not hear from him again. That was several years ago.

[6] After the incident, the Applicant says she was followed by different cars parked outside her home. She noticed some of these cars did not have monthly permits displayed and suspected they may be associated with the state.

[7] On another occasion, the Applicant was at the residence of a friend when a presidential soldier approached the residence and asked for her by name. Her presence was not disclosed but after this incident, she decided to move to South Africa.

[8] However due to violence, xenophobia and an attempted abduction she decided to flee to North America.

[9] She first returned to Zimbabwe for a few days to gather documents and say goodbye to her family. She then left and arrived in the United States in 2017. She crossed into Canada and made her claim for refugee protection.

III. Decision under review

[10] In late 2018, the RPD found the Applicant was not a Convention refugee nor a person in need of protection. The determinative issue was a viable internal flight alternative [IFA].

[11] The Applicant testified the final straw in her decision to depart happened when the presidential soldier came to the driveway and asked for her. Despite her testimony of this visit, the Applicant was unable to provide a specific date of the encounter and the RPD found she made insufficient efforts to obtain corroborating evidence of this event. The RPD found this testimony was fabricated in an attempt to bolster her claim for protection, and made a negative credibility determination.

[12] The RPD also held she voluntarily re-availed when she returned for a few days to pick up her documents and say goodbye to her family. The RPD drew a negative credibility inference from the Applicant's re-availment concerning subjective fear.

A. *Internal Flight Alternative*

[13] First Prong – No serious possibility of persecution: The Applicant testified she fears the politician could go to the IFA at any time. The politician was a national politician with influence throughout Zimbabwe, which government had powers of surveillance throughout the country. According to country condition evidence, the country is also one where officials and police frequently engage in corrupt practices with impunity, particularly senior officials of the governing party. In addition, authorities generally consider gender-based violence (such as the rape in this case) to be a private matter and prosecution is rare. There is also social stigma towards the victim. These perceptions and the belief rape is a "fact of life" result in low reporting rates.

[14] The RPD noted the Applicant did not hear from the politician after the call several months after the attack, during which she verbally confirmed she would not cause him problems.

[15] The RPD noted the Applicant never asked the police or other authorities to protect her regarding the suspicious car events.

[16] The RPD found insufficient evidence to establish the politician or any of his associates had contact with the Applicant, her friends or family members since their direct phone

conversation. The RPD found it reasonable to expect family members or friends would have been contacted by the politician if he was interested in locating her. Therefore, the RPD found there to be a lack of interest and motivation to pursue the Applicant in the IFA and found no serious possibility the Applicant faces persecution should she relocate to the IFA, which is a considerable distance away.

[17] Second Prong – Reasonableness: The RPD found it reasonable that in returning to Zimbabwe, she could relocate to the IFA. The Applicant testified her job experience would allow her to get a job there. The Applicant also speaks Shona and English, which are both official languages of Zimbabwe. Although she would have to make some adjustments, the RPD found insufficient evidence to establish this would be problematic for the Applicant.

IV. Issues

[18] The only issue in this application is whether the Decision is reasonable.

V. Standard of Review

[19] In *Canada Post Corp v Canadian Union of Postal Workers*, 2019 SCC 67, majority reasons by Justice Rowe, which was issued at the same time as the Supreme Court of Canada's decision in *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 [*Vavilov*], the majority explains what is required for a reasonable decision, and importantly for present purposes, what is required of a court reviewing on the reasonableness standard: it must be "justified in relation to the facts and law that constrain the decision maker" (*Vavilov*, at para. 85).

VI. Analysis

A. *Internal Flight Alternative*

[20] I recently summarized jurisprudence relating to IFAs in *Lawal v Canada (Public Safety and Emergency Preparedness)*, 2020 FC 301:

> [8] First, it is settled law that the two-prong test to be applied in determining whether there is an IFA was established in *Rasaratnam v Canada (Minister of Employment and Immigration)*, [1992] 1 FC 706, and *Thirunavukkarasu v Canada (Minister of Employment and Immigration)*, [1994] 1 FC 589. The test was recently outlined by Justice Pamel in *Feboke v Canada (Citizenship and Immigration)*, 2020 FC 155 at para 15:
>
> > [15] The decisions in *Rasaratnam v Canada (Minister of Employment and Immigration)*, [1992] 1 FC 706, and *Thirunavukkarasu v Canada (Minister of Employment and Immigration)*, [1994] 1 FC 589, have established a two-prong test to be applied in determining whether there is an IFA: (i) there must be no serious possibility of the individual being persecuted in the IFA area (on the balance of probabilities); and (ii) conditions in the proposed IFA must be such that it would not be unreasonable in all the circumstances for an individual to seek refuge there (*Reci v Canada (Citizenship and Immigration)*, 2016 FC 833 at para 19; *Titcombe v Canada (Citizenship and Immigration)*, 2019 FC 1346 at para 15). Both prongs must be satisfied in order to make a finding that the claimant has an IFA. This two-prong test ensures that Canada complies with international norms regarding IFAs (UNHCR Guidelines at paras 7, 24-30).

[21] The onus is on the Applicant to negative one or the other of the two prongs: *Ranganathan v Canada (Minister of Citizenship and Immigration)*, [2001] 2 FC 164 [Létourneau JA] at paragraph 13.

B. *First Prong: serious possibility of the individual being persecuted in the IFA area*

[22] In *Nimako v Canada (Minister of Citizenship and Immigration),* 2013 FC 540 [Campbell J] at para 7, this Court held an analysis of whether there is a serious possibility of an applicant being persecuted includes whether an agent of persecution has probable means and motivation to search for the Applicant in the suggested IFA.

[23] The RPD found the politician lacked interest and motivation to pursue the Applicant to a different part of Zimbabwe, such as the IFA. The Applicant submits the RPD's finding was unreasonable because it was based on conjecture, and because it failed to consider the ability of the agent of persecution to find the Applicant in the IFA. I agree on both counts.

[24] As to the issue of conjecture, the Applicant relies on *Soos v Canada (Minister of Citizenship and Immigration),* 2019 FC 455 [Diner J] at paras 12-16, in which the RPD engaged in speculation rather than reasoned inference. The Respondent submits there was a lack of credible evidence the politician had contacted the Applicant or any of her friends or family since May 2017. However, the RPD did not explain why the agent of persecution would be contacting her family or friends. This is with respect, conjecture by the RPD, particularly because the politician stopped contact after the Applicant told him she would not be "a problem".

[25] I should also say at this point the RPD accepted without comment and without any negative credibility findings, negative weight or inferences, that the sexual assault took place as the Applicant described. This I consider important in all the circumstances. I therefore accept the

Applicant's core evidence of being sexually assaulted by the politician, and that he was a senior government official.

[26] With respect, upon a review of the reasons and the record, I am not satisfied the RPD adequately assessed the ability of the agent of persecution to find his victim should he want to.

[27] In this connection, the agent of persecution is a national politician which gives rise to a presumption there is no IFA. This presumption flows from the UNHCR Handbook and our jurisprudence. With respect, this was a fatal error sufficient to determine this application in favour of the Applicant. As the Applicant puts it her Memorandum:

> 53. The UNHCR Manual, which the Supreme Court held "must be treated as a highly relevant authority," in refugee determination states that, where an agent of persecution is a national authority, it creates a presumption that internal relocation is not available.
>
> > National authorities are presumed to act throughout the country. If they are the feared persecutors, there is a presumption in principle that an internal flight or relocation alternative is not available.
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> United Nations High Commissioner for Refugees, *Handbook on Procedures and Criteria for Determining Refugee Status*, at 109
>
> *Chan v. Canada (Minister of Employment and Immigration)*, [1995] 3 SCR 593 at para 46

[28] In this connection it is worth remembering that *Chan v. Canada (Minister of Employment and Immigration)*, [1995] 3 SCR 593 at para 46 states:

> 46 These considerations reinforce my view that this Court should not simply disallow the appellant's Convention refugee claim on the basis that he failed to establish that he had an objectively well-founded fear of persecution in the form of sterilization. Instead, as I noted, I believe the appellant is entitled

> to have his claim reheard before a Refugee Board in accordance with the guidelines of the United Nations High Commissioner for Refugees *Handbook on Procedures and Criteria for Determining Refugee Status*, the "UNHCR Handbook". As I noted in *Ward*, at pp. 713-14, while not formally binding upon signatory states such as Canada, the UNHCR Handbook has been formed from the cumulative knowledge available concerning the refugee admission procedures and criteria of signatory states. This much-cited guide has been endorsed by the Executive Committee of the UNHCR, including Canada, and has been relied upon for guidance by the courts of signatory nations. Accordingly, the UNHCR Handbook must be treated as a highly relevant authority in considering refugee admission practices. This, of course, applies not only to the Board but also to a reviewing court.

[29] The Applicant further submits the RPD's reasons did not include any specific consideration of the Applicant's risk in light of the agent of persecution being a national authority. Beyond stating in the Facts summary that he was a senior national politician, "the RPD's reasons are silent on the evidence of [the politician's] wealth and power throughout Zimbabwe. Instead of focusing on this fundamental aspect of this fundamental aspect of the Applicant's claim, the RPD relied on conjecture about [the politician's] motivations. The RPD also relied on geographic distance and a supposed lack of evidence regarding family members being physically targeted. Such reliance is not based in the 21st century realities of cyber surveillance or the level of corruption in Zimbabwe." I agree.

[30] I also agree as the Applicant submits that "the RPD's failure to consider the risk posed by the agent of persecution in the IFA is further jeopardized by the lack of discernible consideration of the evidence on the record that Zimbabwean government officials have access to significant resources and can legally monitor all communications in the country, as well as evidence that they can act with impunity."

[31] As noted above, the record includes a great deal of objective evidence in this respect.

[32] With respect, a decision maker errs, as here, when they fail to consider the grounds of risk raised. In *Velasquez v Canada (Minister of Citizenship and Immigration)*, 2010 FC 1201, Justice O'Reilly overturned the RPD's determinative IFA finding because of its failure to identify the particular risks faced by the applicant in the IFA location. Justice O'Reilly's reasoning focused on the requirement to consider each person's particular circumstances:

> [16] There may, however, be an overlap between the Board's consideration of an IFA and its analysis of state protection. The first branch of the IFA test is met where there is no serious possibility of persecution in the particular location. That finding may flow either from a low risk of persecution there or the presence of state resources to protect the claimant, or a combination of both. But, in either case, the analysis can only be carried out properly after the particular risk facing the claimant has been identified.
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> [17] Indeed, the Board's failure to consider the specific risks feared by a claimant in an IFA analysis will constitute an error of law (*Gutierrez v Canada (Minister of Citizenship and Immigration)*, 2010 FC 1010 (CanLII)). It is an error, therefore, for the Board to make a blanket finding that an IFA is available to a refugee claimant, without reference to the type of persecution feared by the claimant or that person's particular circumstances. Again, the first question the Board must answer when a proposed IFA is in issue is whether, on a balance of probabilities, there is a serious possibility that the claimant will be persecuted in the location proposed by the Board. Generally speaking, that question cannot be answered if the nature of the person's fear has not been specifically identified.
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> [Emphasis added]

[33] I also note in *Akinola v Canada (Minister of Citizenship and Immigration)*, 2019 FC 1308 at para 41, Justice Manson applied these principles on judicial review of a decision where the RAD rejected the applicant's arguments that the agent of persecution, a retired police officer and

"powerful man," could use his contacts to track them down. Justice Manson found the RAD had not reasonably engaged with the evidence that the agent of persecution was an "influential and powerful man in the government who could use police contacts to find the Applicants."

[34] I conclude the RPD came to an unreasonable conclusion on the first prong.

C. *Second Prong: reasonableness for an individual to seek refuge in the IFA in all the circumstances*

[35] In the alternative, I also agree with the Applicant's submission the RPD acted unreasonably in finding she would be safe provided she does not report her sexual assault or do anything to otherwise have it become public knowledge. The Applicant relies on *Thirunavukkarasu v Canada (Minister of Employment and Immigration)*, [1994] 1 FC 589 (FCA) [*Thirunavukkarasu*] [Linden JA] at para 14 for the proposition that a refugee claimant cannot be expected to live in hiding to remain safe in an IFA. I agree this is important when considering the viability of an IFA.

[36] The Respondent submits the Applicant decided not to report the assault to authorities and there was no evidence of her intention or desire to report the assault should she return to Zimbabwe. In my view, this makes no difference nor does it make a difference that the RPD did not suggest the Applicant should conceal herself in the IFA; the clear inference from and the effect of the RPD's Decision is that the Applicant would be safe in the IFA on condition and so long as she does not report the sexual assault. This is not sustainable given constraining jurisprudence from the Federal Court of Appeal.

[37] Such a finding is not only contrary to the ratio of the Federal Court of Appeal's Decision in *Thirunavukkarasu*, but with respect I am unable and see any reasons to confine *Thirunavukkarasu* to its facts. In my respectful view, this jurisprudence applies whether a tribunal makes it a condition that a victim of sexual assault keep silent either expressly, or implied as here: whether it entails a condition of hiding, or of keeping silent about a sexual assault. The rule in *Thirunavukkarasu* is similar to rules preventing the RPD from refusing a claim by expressly or implicitly requiring a person to practice their religion privately: see, *Jasmin v Canada (Minister of Citizenship and Immigration),* 2003 FC 1017 [Russell J] at para 20-21; *Husseini v Canada (Minister of Citizenship and Immigration),* 2002 FCT 177 [Lemieux J] at para 20; *Fosu v Canada (Minister of Employment and Immigration),* 2003 FCT 580 [Denault J] at para 5.

[38] In my respectful view, to allow otherwise is to allow our refugee tribunals to become complicit in the potential frustration and denial of justice to this and other victims of sexual assault.

VII. Credibility Findings

[39] In my respectful view, the RPD's finding of voluntary re-availment based on the Applicant's return for a few days to pick up her documents and say goodbye to her family is, without more, quite unreasonable. To quote Justice Mosely in *Abawaji v. Canada (Minister of Citizenship and Immigration),* 2006 FC 1065 at para 15: "As noted by Justice John O'Keefe in *Camargo v. Minister of Citizenship and Immigration*, 2003 FC 1434 at paragraph 35, the United Nations High Commissioner for Refugees' Handbook on Procedures and Criteria for Determining Refugee Status (Geneva, 1988) indicates that "re-establishment" and "re-availment" both require an element of intent on the part of a claimant before physical presence in a country

will negate refugee status. A temporary visit by a refugee to the country where persecution was feared without an intention to permanently reside there should not result in the loss of refugee status."

[40] I decline to make determinations with respect to other credibility findings because there will be a rehearing of this matter.

VIII. Conclusion

[41] In my respectful view, the Applicant has shown the Decision of the RPD was unreasonable because it is not justified on the record given constraining law.

IX. Certified Question

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

JUDGMENT in IMM-5385-18

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

"Henry S. Brown"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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