Federal Court  Cour fédérale

Date: 20211207

Docket: IMM-4080-20

Citation: 2021 FC 1370

Ottawa, Ontario, December 7, 2021

PRESENT: The Honourable Mr. Justice Mosley

BETWEEN:

BERNA KONECOGLU

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Introduction

[1] This is an application for judicial review of a decision of the Refugee Appeal Division (RAD) of the Immigration and Refugee Board of Canada dated August 18, 2020. The RAD confirmed the Refugee Protection Division's (RPD) decision that the applicant was neither a Convention refugee nor a person in need of protection pursuant to sections 96 and 97 of the *Immigration and Refugee Protection Act*, SC 2001, c 27 (*IRPA*).

[2] For the reasons that follow, the application is dismissed.

II. **Background**

[3] The applicant is a citizen of Turkey. Her parents were both members of the Alevi Islamic tradition but the applicant does not practice the faith. She alleges, however, that she took part in organizing pro-Alevi demonstrations against the Turkish government and that she was a member of the Alevi Association in Istanbul. In March 2012, July 2013 and May 2014, she says that she took part in pro-Kurd demonstrations and was arrested and physically abused by the police.

[4] The applicant also claimed that she was in a relationship with a man who abused and sexually assaulted her after she ended the relationship in April 2015. This was reported to the police who, she alleges, took no action. Because of this, the applicant believes the man was a member of the police or the secret service. In July 2015, the applicant obtained a visitor visa for Canada. She arrived on August 7, 2015, and filed a claim for protection in November 2015.

[5] The RPD hearing took place over two days in June 2018. The claim was rejected on July 9, 2018, on a total of thirty (30) credibility grounds. On appeal, the applicant argued that the RPD erred in its assessment of a change to her Basis of Claim document and in its assessment of a report from a psychotherapist. The RAD accepted late evidence of membership in organizations that had been found to be inadmissible by the RPD. It rejected two of the RPD's credibility findings but accepted the remainder and dismissed the appeal on August 10, 2020.

III. **Issues and Standard of Review**

[6] As a preliminary matter, the applicant submitted fresh documentary evidence on this application that was not before the RPD or the RAD. In her memorandum of argument, the applicant asserts that admission of the evidence would be in the interests of justice. The applicant alleges that the reason that the evidence was not submitted to either tribunal was because her former counsel failed to request the information from her. This amounts to an allegation of inadequate representation. The applicant has not demonstrated any attempt to follow the Court's protocol regarding allegations against counsel.

[7] A judicial review application examines the reasonableness of the decision made based on material before the decision-maker: *Ochapowace First Nation v. Canada (Attorney General)*, 2007 FC 920, [2008] 3 F.C.R. 571, at paras. 9 and 10, aff'd *Ochapowace First Nation v. Canada (Attorney Genera*l), 2009 FCA 124, 389 N.R. 87. Fresh evidence is not normally admissible: *Association of Universities and Colleges of Canada v. Canadian Copyright Licensing Agency (Access Copyright)* 2012 FCA 22, 428 N.R. 297. No attempt has been made to demonstrate that the evidence in question meets one of the exceptions to the fresh evidence principle: *Sharma v Canada (Attorney General),* 2018 FCA 48, at para 8. Accordingly, the evidence is inadmissible and was disregarded.

[8] The applicant has raised numerous issues with the RAD's decision including that the panel failed to give her testimony the benefit of the doubt, accept that she is an Alevi or be at risk

as a returning refugee claimant, none of which were dispositive. I am satisfied that those that must be addressed are as follows:

a) Were the RAD's credibility findings reasonable?

b) Did the RAD err in finding that the RPD acted in accordance with the Board's guidelines pertaining to gender and vulnerable persons?

[9] The applicable standard of review for these issues is reasonableness. As determined by the Supreme Court of Canada in *Canada (Citizenship and Immigration) v Vavilov*, 2019 SCC 65 [*Vavilov*] at paragraph 30, reasonableness is the presumptive standard for most categories of questions on judicial review, a presumption that avoids undue interference with the administrative decision maker's discharge of its functions. While there are circumstances in which the presumption can be set aside, as discussed in *Vavilov*, none of them arise in the present case.

[10] To determine whether the decision is reasonable, the reviewing court must ask "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" (*Vavilov* at para 99). The party challenging the decision bears the burden of showing that it is unreasonable (*Vavilov* at para 100).

[11] Not all errors or concerns about a decision will warrant intervention. To intervene, the reviewing court must be satisfied that there are "sufficiently serious shortcomings" in the decision such that it does not exhibit sufficient justification, intelligibility and transparency.

Flaws or shortcomings must be more than superficial or peripheral to the merits of the decision, or a "minor misstep". The problem must be sufficiently central or significant to render the decision unreasonable: *Vavilov*, at para 100; *Canada Post Corp v Canadian Union of Postal Workers*, 2019 SCC 67, at para 33; *Canada (Citizenship and Immigration) v Mason*, 2021 FCA 156, at para 36.

IV. **Analysis**

A. *The RAD did not err in its credibility analysis.*

[12] As noted above, the RPD made an extraordinary number of negative credibility findings. Before the RAD, the applicant challenged only two of the thirty findings – those pertaining to the altered BOC and treatment of the psychotherapist's report. The RAD accepted that the RPD had erred with respect to the applicant's explanation for the BOC change but upheld the RPD's treatment of the report.

[13] On this application, the applicant argues that the RAD's treatment of the psychotherapist's report was arbitrary. Following an hour long interview in February 2016, the psychotherapist had concluded that the applicant exhibited symptoms consistent with post-traumatic stress disorder (PTSD), generalized anxiety disorder, and major depressive disorder and expressed some views on the merits of the applicant's claim.

[14] The RAD noted that the RPD had taken the report into account with respect to contradictions and a lack of responsiveness in the applicant's testimony. The RAD agreed with

the RPD's conclusions with regard to the weight to be given to the report's assessment of the applicant's credibility with regard to her history.

[15] The RAD accepted the psychotherapist's finding that the applicant exhibited symptoms of PTSD but found that the value of the report was diminished because the author had provided conclusions and opinions outside the scope of her expertise and without clinical testing, made definitive findings about what had happened to the applicant despite having limited information and provided an assessment of the applicant's future inability to testify based on those conclusions. The applicant did not in fact testify until more than two years later.

[16] The psychotherapist had considered it appropriate to offer a conclusion on the nexus of the applicant's claims to Convention grounds. In view of this, the RAD considered that the psychotherapist had moved away from her role as a neutral assessor in favour of becoming a champion for the applicant and her claim for asylum. In doing so, she had made findings of facts based on a brief interview and without testing the applicant's assertions or conducting clinical tests.

[17] This Court has observed that reports such as that before the RPD and RAD in this case may cross the line separating expert opinion from advocacy: see for example *Molefe v Canada (Minister of Citizenship and Immigration)*, 2015 FC 317 at paras 32-34; *Egbesola v Canada (Minister of Citizenship and Immigration)*, 2016 FC 204 at paras 13-15 [*Egbesola*].

[18] The applicant relies on *Atay v Canada (Citizenship and Immigration)*, 2008 FC 20 [*Atay]* in which Justice O'Keefe found that the Board had erred in failing to take into account a PTSD diagnosis in making credibility findings. However, other jurisprudence of this court has cautioned that the recounting of events to a health professional does not make the events more credible and that an expert report cannot confirm allegations of abuse: *Al-Sarhan v Canada (Citizenship and Immigration)*, 2019 FC 1438 at para 34; *Boyce v Canada (Citizenship and Immigration)*, 2016 FC 922 at para 62); *Moya v Canada (Citizenship and Immigration)*, 2016 FC 315, at para 57; *Czesak v Canada (Citizenship and Immigration)* 2013 FC 1149 at para 40.

[19] In *Egbesola*, Justice Zinn notes at para 12:

> As submitted by the respondent, the "facts" on which the report is based are those told to Dr. Devins by the principal applicant, and thus **are not facts until found to be so by the tribunal.** What can be reasonably taken from the report is that the principal applicant suffers from PTSD, and that she requires medical treatment for it.
>
> [Emphasis added]

[20] Chief Justice Crampton made the following comments in *Kaur v Canada (Citizenship and Immigration)*, 2012 FC 1379, at para 37:

> "…the fact that the report may, as in this case, state that an applicant's PTSD, or other condition, causes the applicant to be fragile, confused, anxious, distressed or emotional during questioning, or to dissociate under stress, ordinarily would not reasonably explain a failure to mention an important aspect of the applicant's story in his or her PIF. This is especially so when the PIF was prepared with the assistance of counsel. Having regard to the above-mentioned teachings in *Newfoundland Nurses*, *Alberta Teachers* and *Halifax*, it is also not immediately apparent how such psychological conditions might suffice to deprive an adverse credibility finding that was based on flagrant contradictions or important discrepancies of its rational support or to deprive it of any reasonable basis."

[21] I am satisfied that in the present matter, the RAD properly considered the psychotherapist's report and gave it appropriate weight in assessing the applicant's credibility.

B. *The RAD did not fail to observe the Chairperson's Guidelines*

[22] The applicant submits that the RAD failed to properly consider whether the RPD observed the *Chairperson Guideline 4: Women Refugee Claimants Fearing Gender-Related Persecution* (*Gender Guidelines*) as well as the *Chairperson Guideline 8: Procedures With Respect to Vulnerable Persons Appearing Before the IRB* (*Vulnerable Persons Guideline*).

[23] The applicant argues that the RPD was insensitive and unsympathetic towards her during the hearing. In her estimation, the panel was dismissive of her mental health issues, and conducted the proceedings in a confrontational, belittling and adversarial tone. It is the applicant's view that the RPD did not adhere to the gender guidelines when questioning in such an aggressive way, especially because it became clear that she has mental health issues. In addition, the applicant argues that it was unreasonable for the RAD to conclude that she could not be considered a vulnerable person as she had not made a request to be treated as such in accordance with the guideline when the RPD member had referred to her as being "vulnerable".

[24] I note that the RAD had the benefit of the full record of the RPD hearing.

(1) Gender Guideline

[25] In her application record, the applicant included extracts from the transcript of the RPD hearing which, she submits, demonstrates that the panel was insensitive towards her. At least one of those excerpts is misquoted. That aside, it was reasonable for the RAD to conclude that the RPD panel was very sensitive towards the applicant as the respondent has demonstrated. When read in context, the extracts do not support the applicant's argument.

[26] The purpose of the Guideline is to ensure sensitivity to an applicant's difficulty in testifying in the context of a gender-based claim: *Manege v Canada (Citizenship and Immigration)*, 2014 FC 374 at para 30; citing *Juarez v Canada (Minister of Citizenship and Immigration)*, 2010 FC 890 at paras 17-20. But they do not serve to cure all deficiencies in the applicant's evidence: *Yu v Canada (Citizenship and Immigration)*, 2021 FC 625 at para 22.

[27] The RAD found the RPD went to considerable lengths to understand the applicant's testimony, provided long breaks, held mid-hearing conferences to see if any accommodations would be necessary for the applicant and avoided asking details or specific questions about her relationship with her abuser. The RPD's reasons expressly referred to the guideline and explained how it was applied during the hearing.

[28] The RAD reviewed the evidence on the record and concluded that the RPD did apply all of the measures it stated that it had done in respecting the guideline. I see no error with the RAD's conclusion.

(2) Vulnerable Persons Guideline

[29] The RPD panel member described the applicant at one point during the hearing as a vulnerable person. However, no application was made in writing in accordance with Rule 50 of the Refugee Protection Division Rules (SOR/2012-256) for the applicant to be provided with any of the available accommodations for vulnerable persons, as the RAD noted. Without taking that step in compliance with the Rule, the applicant cannot now argue that the Board did not apply this guideline.

[30] This may seem to be rigid adherence to a technicality. However, the applicant has not pointed to any specific accommodation that she requested at the hearing and was refused. Moreover, the real issue was whether the RPD's questioning was "condescending, demeaning and dismissive of the trauma and domestic violence and sexual violence claims" as the applicant argues. The RAD had the benefit of a complete review of the RPD record and the excerpts of the hearing submitted by the applicant. Based on that, the RAD concluded that the applicant was in fact questioned with sensitivity and respect. I see no basis in the record to interfere with that finding on the reasonableness standard.

V. **Conclusion**

[31] As noted, the RPD found an extraordinarily high number of credibility issues with the applicant's claim. Only two were challenged on appeal and the RAD accepted one. In my view, the remaining credibility findings were determinative and have not been challenged on this application. Accepting the PTSD diagnosis, as the RPD and RAD did, the main credibility issues

did not stem from a lack of memory or the applicant's incoherent testimony. The applicant's claim was riddled with inconsistencies and implausibilities that did not withstand scrutiny.

[32] I am satisfied that the RAD did not err in considering the applicant's appeal and that the decision was reasonable. There is no basis for the Court to intervene.

[33] No serious questions of general importance were proposed and none will be certified.

JUDGMENT IN IMM-4080-20

THIS COURT'S JUDGMENT is that the application is dismissed. No questions are certified.

"Richard G. Mosley"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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