

Federal Court



Cour fédérale

Date: 20110811

Docket: IMM-156-11

Citation: 2011 FC 989

Ottawa, Ontario, August 11, 2011

PRESENT: The Honourable Mr. Justice Russell

BETWEEN:

SARAH MOHAMMAD ALTWAYJERY

Applicant

and

**THE MINISTER OF CITIZENSHIP AND
IMMIGRATION**

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application pursuant to subsection 72(1) of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 (Act) for judicial review of the decision of the Refugee Protection Division (RPD) of the Immigration and Refugee Board, dated December 14, 2010 (Decision), which refused the Applicant's application to be deemed a Convention refugee or a person in need of protection under sections 96 and 97 of the Act.

BACKGROUND

[2] The Applicant says she is a stateless woman from Gaza, Palestine named Sarah Mohammad Altwayjery. She is accompanied by her pre-school-aged children who are also stateless: Nour Eliman Mahmood Abdelrahman; Linda Mahmood Abdelrahman; and Maher Mahmood Abdelrahman (Minor Applicants).

[3] The Applicant says that, against the wishes of her family who are Hamas supporters, she married her husband in Gaza in 2000. Her husband was targeted by the Hamas over several years in Gaza. When he refused to work with Hamas, the family was threatened and changed addresses within Gaza to avoid attention. In 2008, her husband was badly beaten by the Hamas. In August 2008, three Hamas agents came to their house, hit the Applicant, and locked one child in a closet.

[4] Fearful of this situation and of potential war with Israel, the husband made arrangements for the family to be smuggled out of Gaza in January 2009. He had been planning to go with them but, when his father was injured by a bomb, he decided to stay in Gaza to care for him. The Applicants fled Gaza with a smuggler and came to Canada, arriving on January 5, 2009 and claiming refugee protection on February 6, 2009.

[5] Their application for refugee protection was denied.

DECISION UNDER REVIEW

[6] The determinative issue in the RPD's lengthy decision was identity. The RPD accepted that the Applicant had established her name and the names of her children by her oral testimony. The RPD also accepted that they were Palestinian. However, the RPD found that the Applicant did not establish, on a balance of probabilities, that she and her children were residents of Gaza rather than of the West Bank. Because the Applicants allege a fear of Hamas only in Gaza, and not in the West Bank, their claim for protection hinges on their residency in Gaza. On this basis, the RPD denied their claim.

[7] The RPD explained that the Applicant had presented no identity documents from Palestine. The Applicant said that this was because the smuggler who brought them to Canada had taken all of the documents and disappeared. The Applicant claimed to be unable to obtain replacement documents sent from Gaza via her husband or friends because she had not been in touch with anyone in Palestine for fear of revealing her location to her Hamas persecutors, who would allegedly harm her husband if they learnt that she was in Canada.

[8] The RPD noted that s. 106 of the Act provides that the RPD must determine "whether the claimant possesses acceptable documentation establishing identity, and if not, whether they have provided a reasonable explanation for the lack of documentation or have taken reasonable steps to obtain the documentation." Rule 7 of the *Refugee Protection Division Rules*, SOR/2002-228 (Rules) also requires a claimant to provide identity documents, explain why they are missing, or take steps

to obtain them. Accordingly, the RPD focused its analysis on whether the Applicant had complied with these rules.

[9] The RPD found that the Applicant's testimony regarding her identity document was contradictory and not credible. The Applicant was vague and evasive in itemizing what identification she allegedly had possessed in Gaza. Her claim that she could not remember what documents she had had, their appearance, or where they had been kept in her home in Gaza, was not credible in light of her testimony that her husband had specifically collected the documents from a filing cabinet the night she fled and had given them to a smuggler.

[10] The RPD stressed that the Applicant had been informed of the importance of establishing her identity on numerous occasions, and she knew the absence of her identity documents was a major issue in her claim. As such, the RPD found it puzzling that she was unprepared or unwilling to explain which documents she had previously possessed and where they were.

[11] Because she had no documents, the Applicant relied on the declarations of fellow Palestinians in Winnipeg to establish her origins. The RPD accepted that these declarations established that she is indeed Palestinian, but not that she is a resident of Gaza. None of the declarants is from Gaza and their declarations do not speak to the Applicant coming from there.

[12] Two individuals attended the hearing to testify in support of the Applicant, but they did not establish her residency. Unfortunately, one of them had to leave before testifying because of delays in the hearing caused by problems with the hearing room. Counsel indicated that this witness, who

was not from Gaza, would have been able to provide general information about Gaza but did not know the Applicant or her personal circumstances in Palestine (nor did he know anyone else from Gaza in Canada). As such, the RPD concluded that this witness would not have been able to confirm the determinative issue of the Applicant's residency and thus his testimony was not necessary for a fair hearing.

[13] Similarly, the other witness, who did testify, was not able to establish that the Applicant came from Gaza. This witness had not known the Applicant or her family prior to her arrival in Canada. He came from the West Bank, knew few people from Gaza, and had visited Gaza only once for three hours. He knew nothing specific about the Applicant's situation. He claimed that her accent and the food she made suggested she was from Gaza, but since he himself had only had limited exposure to Gaza, the RPD found that he was not able to establish her credibility and/or residence.

[14] The RPD also found the Applicant's testimony about her alleged residences in Gaza not credible because it was contradictory and confusing. Her answer to Question 11 of her PIF states that from 1999 until July 2008 she lived on Alwahada Street at "different addresses" and that from July 2008 until January 2009 she lived at Hamaliyrah 30 Street. In her oral testimony, she said she lived on Alwahada Street and in the Hay Al Rammal district. When asked to clarify, she said that the 30 Street address was the Hay Al Rammal district. She then said she had moved back and forth several times between Alwahada Street and the Hay Al Rammal district. There was also a contradiction between the dates of these moves given in the PIF and at the hearing.

[15] The Applicant and her counsel explained that these inconsistencies were due to her nervousness, anxiety, and lack of focus. The RPD considered these explanations but found that they did not account for the significant problems in testimony. With respect to her explanation that she was tired because of delays in the hearing and gave confusing testimony for this reason, the RPD noted that the delays occurred in the afternoon, after the bulk of her testimony had been given. In particular, the Applicant had been questioned about her residences in the morning, before the delays had taken place.

[16] The RPD also considered and rejected the Applicant's explanation that she had been confused by the English instructions on the PIF form and had given incomplete and inaccurate information for this reason. The RPD noted that she had affirmed the PIF both at the time of signing and at the hearing, and she had also not chosen to review or amend her PIF in the 16 months after she filed it. The Applicant did make some changes to her original version of the form, suggesting a deliberate attempt to clarify the information, and suggesting that she had completed the form when the residence information was fresh in her mind. The RPD also noted that the Applicant had had the PIF instructions translated in their entirety, thus lessening the chances of misunderstanding.

[17] Furthermore, the RPD noted that the Applicant used vague terminology to refer to her alleged home territory, giving only the general answer of "Gaza" to questions about the whereabouts of her birth certificate, her identity card, certain bomb attacks, etc. She was unable to name any specific locations within the territory, and displayed a lack of real knowledge of her alleged home.

[18] The RPD also found that the Applicant's testimony regarding her family was not credible: for example, she mentioned a sister who she saw often after her 2000 marriage and who helped with her children, the first of whom was born in 2004. However, the PIF indicates that this sister died from cancer in 2000 (the same year the Applicant was married and four years before her first child was born). When confronted with this discrepancy, the Applicant provided unconvincing explanations, saying that she saw her sister for a few months only after the wedding and before she died, and that she was the one who had helped with her sister's children and not vice versa.

[19] Similarly, the Applicant's testimony about the timing of her parents' deaths does not match her PIF information, suggesting that she was fabricating information about the circumstances and deaths of her family.

[20] The RPD found the Applicant's testimony of a complete lack of contact with her husband to be implausible. When asked why she cannot ask her husband, who allegedly remains in Gaza, to send her some identification, she claimed that they are not in contact out of a fear that he will be harmed by the Hamas if her location in Canada is revealed (which she says could result from a phone call). She says she does not trust anyone in the Winnipeg Palestinian community to make inquiries about her husband. Since her husband was originally planning to accompany her to Canada (which suggests that their relationship is intact) the RPD found it implausible that neither party would not have at least tried to ascertain the other's survival of the bombing and the alleged escape from Gaza.

[21] The Applicant's testimony about the dates of the bombing was also inconsistent with the documentary evidence. The Applicant said that she fled Gaza in January 2009, a day and a half after the Israelis began to bomb the territory; however, other evidence indicates that the Israeli bombing actually occurred in December 2008. When confronted with this discrepancy, she said that she was confused by the English language, but the RPD did not accept this explanation as the discrepancy also appeared in the PIF, which had been translated to the Applicant in its entirety.

[22] The RPD considered whether the Chairperson's Guidelines on Women Refugee Claimants Fearing Gender Related Persecution applied to the Applicant's situation, and concluded it did not, having questioned the Applicant about whether she faced gender-based persecution.

[23] The Applicant also alleged that she feared her father-in-law, since he had been opposed to her marriage and she feared he would influence her husband to take her children away from her. Since her husband had originally fully intended to accompany her in the flight from Gaza, the RPD did not find this fear credible.

[24] There were other credibility issues, such as inconsistent testimony about whether the Applicant and her husband had possessed a telephone, and about the plane flight to Canada. However, this testimony took place towards the end of the hearing when the Applicant was tired and concerned about her children falling asleep in the back of the room. Therefore, the RPD did not rely on these inconsistencies in making its finding and relied on the other credibility issues mentioned in more detail above.

ISSUES

[25] The Applicant raises the following issues:

- a. Did the Board err in finding that the Applicant did not establish her identity as a resident of Gaza?

STATUTORY PROVISIONS

[26] The following provisions of the Act are applicable in these proceedings:

Credibility

106. The Refugee Protection Division must take into account, with respect to the credibility of a claimant, whether the claimant possesses acceptable documentation establishing identity, and if not, whether they have provided a reasonable explanation for the lack of documentation or have taken reasonable steps to obtain the documentation.

Crédibilité

106. La Section de la protection des réfugiés prend en compte, s'agissant de crédibilité, le fait que, n'étant pas muni de papiers d'identité acceptables, le demandeur ne peut raisonnablement en justifier la raison et n'a pas pris les mesures voulues pour s'en procurer.

[27] The following provision of the Rules is also applicable in this case:

Documents establishing identity and other elements of the claim

7. The claimant must provide acceptable documents establishing identity and other elements of the claim. A claimant who does not provide acceptable documents must explain why they were not provided and what steps were taken to obtain them.

Documents d'identité et autres éléments de la demande

7. Le demandeur d'asile transmet à la Section des documents acceptables pour établir son identité et les autres éléments de sa demande. S'il ne peut le faire, il en donne la raison et indique quelles mesures il a prises pour s'en procurer.

STANDARD OF REVIEW

[28] The Supreme Court of Canada in *Dunsmuir v New Brunswick*, 2008 SCC 9, held that a standard of review analysis need not be conducted in every instance. Instead, where the standard of review applicable to the particular question before the court is well-settled by past jurisprudence, the reviewing court may adopt that standard of review. Only where this search proves fruitless must the reviewing court undertake a consideration of the four factors comprising the standard of review analysis.

[29] The issue in this case concerns the Applicant's identity, and her credibility in establishing that identity. The applicable standard of review is reasonableness: see *Zheng v Canada (MCI)*, 2008 FC 877 at paragraph 13: "In light of *Dunsmuir* and this Court's previous jurisprudence, I am of the view that the standard of review applicable to identity findings is that of reasonableness."

[30] When reviewing a decision on the standard of reasonableness, the analysis will be concerned with "the existence of justification, transparency and intelligibility within the decision-making process [and also with] whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law." See *Dunsmuir*, above, at paragraph 47; and *Canada (Minister of Citizenship and Immigration) v Khosa*, 2009 SCC 12 at paragraph 59. Put another way, the Court should intervene only if the Decision was unreasonable in the sense that it falls outside the "range of possible, acceptable outcomes which are defensible in respect of the facts and law."

[31] The Applicant also says in her argument that the RPD failed to give sufficient reasons for rejecting her claim and thus breached procedural fairness. This issue will be reviewed under a standard of correctness. See *Andryanov v Canada (Minister of Citizenship and Immigration)* 2007 FC 186 at paragraph 15; and *C.U.P.E. v Ontario (Minister of Labour)*, 2003 SCC 29 at paragraph 17.

ARGUMENTS

The Applicant

[32] The Applicant argues that the RPD erred in finding that she did not establish her identity as a resident of Gaza. The Applicant acknowledges that she bore the onus to prove her identity and submits that she provided a reasonable explanation for lacking identification documents, which the RPD should have accepted.

[33] The Applicant escaped Gaza with the help of a smuggler who took her documents. Alone in a completely foreign environment, she was vulnerable to her smuggler and had no choice but to follow his directions. The RPD was unreasonable in not accepting this explanation, and in finding it implausible that she would entrust her and her children's lives to a smuggler and give him all of her documents. Her statement that it was not credible that "the claimant would entrust her and her children's lives to a smuggler whom they didn't know and would give him all her personal information including document..." shows a lack of understanding of the Applicant's background. Clearly, the RPD did not understand the gravity of the situation in Gaza and the necessity of putting

one's life in the hands of smugglers who are strangers. This is a commonplace in such dire circumstances.

[34] The RPD failed to provide clear grounds for its disbelief that the Applicant had not, or could not, contact her husband out of fear of retribution by Hamas. The RPD unreasonably failed to understand the fear held by the Applicant arising from the environment in which she was raised.

[35] The RPD's analysis of the evidence is unreasonable in being overly critical of the apparent inconsistencies between the PIF and the Applicant's oral testimony. It was clear that the Applicant had difficulties understanding the interpreter, and she offered reasonable explanations consistent with her PIF whenever she was asked to clarify something. The RPD unreasonably dismissed these explanations on the grounds that the Applicant *should have* understood the questions the first time they were posed to her.

[36] Apart from reviewing the difficulties in pinpointing the exact residences held by the Applicant at different ages, the RPD does not explain how the Applicant's responses about other locations in Gaza are vague or general.

[37] The Applicant alleges that the RPD failed to give sufficient reasons to justify the Decision and thus breached procedural unfairness.

The Respondent

[38] The Respondent submits that the RPD's findings respecting identity are entirely reasonable. The onus was on the Applicant to offer proof of her identity and residence. The RPD found that she had failed to do so satisfactorily. This was a conclusion that was reasonably open to the RPD. The Court's intervention is therefore not merited.

[39] The Respondent objects to the Applicant's argument that the RPD's disbelief that she would give her identity documents to an unknown smuggler shows a lack of understanding of the Applicant's circumstances. The Respondent points out that the Applicant, in making this argument, quotes the RPD out of context and refers only the first half of the sentence containing this allegedly insensitive remark. Reading the sentence as a whole, it is apparent that the RPD said "I do not find that it is credible that the claimant would entrust her and her children's lives to a smuggler whom they didn't know and would give him all her personal information including documents, while refusing to trust the people from her community who had befriended her in Winnipeg for the past year [to help contact her husband]". Read in context, this sentence shows that the RPD did not find it credible that the Applicant did not trust her friends in Winnipeg to help contact her husband, when she had entrusted a smuggler with her life, her children's lives, and their personal documents.

[40] The Applicant has relied on this mischaracterization to argue that the RPD unreasonably rejected her explanation for missing documents (that the smuggler had them) and denied the claim on that basis. In actuality, however, it is clear from the reasons that the RPD found the Applicant's testimony in general not to be credible because of its contradictory, vague and evasive nature, and

for various reasons beyond any disbelief about her trust in the smuggler. The Applicant has not really taken issue with these findings about the vague and contradictory nature of her testimony; as such, these findings stand. In light of her unreliable testimony, it was reasonable of the RPD to conclude that she had not established her identity or residence on the basis of her testimony.

[41] The Respondent also submits that although the Applicant would have preferred that the RPD place more weight on her alleged circumstances and fears, it is up to the RPD to decide how to weigh the evidence, and the Court cannot intervene on this basis.

[42] The Applicant complains that the RPD was overly critical in noting inconsistencies between her PIF and her oral testimony. She alleges that her testimony was in fact consistent with her PIF. However, the Respondent points out that the Applicant does not aver in her affidavit that the RPD incorrectly repeated her testimony; thus, this argument must fail for a lack of evidentiary foundation. The inconsistencies are evident from a review of the RPD's reasons and the PIF; the Applicant even acknowledged that she was inaccurate and failed to mention certain information (see paragraph 29 of the RPD's Reasons).

[43] Furthermore, an examination of her PIF and her testimony shows that she was indeed inconsistent. For example, regarding her residences in Gaza, she gave a number of inconsistent answers about when and where she moved to and from different addresses. The RPD gave the Applicant the chance to explain these inconsistencies, and she failed to do so. Therefore, it was reasonable for the RPD not to accept her testimony as credible. Contradictions and discrepancies in the evidence of a claimant are a well-accepted basis for a finding of lack of credibility.

[44] The Applicant also argues that the RPD was unreasonable in dismissing the Applicant's explanations for her inconsistencies; however, the Respondent submits that it is clear from a review of the reasons that she was given a number of opportunities to explain them. The Applicant is simply asking the Court to reweigh the evidence.

[45] The Applicant further argues that the RPD erred in failing to recognize that the Applicant had difficulty understanding the questions put to her, and suggests there "may be a cultural difference the Board failed to recognize". However, the reasons make it clear that the RPD took into account the Applicant's explanation that she was nervous and had difficulty with the English language; the RPD nevertheless concluded that her explanations did not account for the significant problems in testimony. In asking the Court to overturn this reasonable conclusion, the Applicant is simply asking for a reweighing of the evidence.

[46] The Applicant also argues that the RPD failed to provide sufficient reasons to substantiate her conclusion that the Applicant's lack of specificity about different locations within "Gaza" betrayed a lack of actual knowledge about the territory. As was established in *Via Rail Canada Inc v National Transportation Agency*, [2001] 2 FC 25; and [2000] FCJ No 1685 at paragraphs 21 and 22, adequate reasons are present where the major points in issue are addressed and the decision-maker's reasoning is transparently communicated. This standard was met here: the RPD's findings transparently explain the reasoning process.

[47] The Applicant also accuses the RPD of failing to provide clear grounds for rejecting her explanation for why she has not contacted her husband; the Respondent submits that this argument

is invalid. The RPD was cognizant of the Applicant's alleged fear of Hamas; nevertheless, the RPD found it was not credible that neither partner would attempt to ascertain whether the other had survived the bombing and that the Applicant would not trust her friends in Winnipeg to help her make contact with her partner. The RPD's reasoning is clear and, in objecting to it, the Applicant is really asking the Court to reweigh the evidence.

ANALYSIS

[48] This is one of those cases where there is very little the Court can say by way of analysis other than that it disagrees with the Applicant's criticisms of the Decision.

[49] The Applicant appears to think that she was treated unfairly by the RPD. She says that the RPD was overly critical, should have accepted her explanations for the inconsistencies and vagaries in her testimony, failed to appreciate her difficulties with English, failed to appreciate the circumstances under which she had had to leave Gaza, and failed to appreciate how Gaza is organized at an administrative level.

[50] A reading of the Decision and the CTR reveals that nothing could be further from the truth. The RPD took great care, and showed great patience, in identifying the problems surrounding the Applicant's identity as a Palestinian from Gaza, explained the problems to the Applicant, and gave her every opportunity to explain discrepancies and clarify vagaries, taking into account that the Applicant was under stress at the hearing and that she had testified through an interpreter. The

Applicant was also forewarned about documentation issues and she and her counsel had ample time to prepare themselves to address these issues.

[51] The RPD provided a thorough and transparent account of why the Applicant had not established her identity as a Palestinian from Gaza. It is always possible to disagree with the RPD's findings, as the Applicant does, and to claim they were unreasonable. Having heard the Applicant on all points of concern, I can see no basis for an allegation that the RPD acted unreasonably or failed to afford the Applicant procedural fairness. The Decision provides justification, transparency and intelligibility within the decision-making process and falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law. See *Dunsmuir*, above, at paragraph 47.

[52] In the end, the Applicant is simply asking the Court to reweigh the evidence and re-decide the issues in her favour. This is not the role of the Court in judicial review. See *Baylon v Canada (Minister of Citizenship and Immigration)*, 2009 FC 938 at paragraph 25.

[53] Counsel agree that there is no question for certification and the Court concurs.

JUDGMENT

THIS COURT'S JUDGMENT is that

1. The application for judicial review is dismissed.
2. There is no question for certification.

“James Russell”

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: IMM-156-11

STYLE OF CAUSE: SARAH MOHAMMAD ALTWAYJERY
and
THE MINISTER OF CITIZENSHIP AND
IMMIGRATION

PLACE OF HEARING: Winnipeg, Manitoba

DATE OF HEARING: July 12, 2011

**REASONS FOR JUDGMENT
AND JUDGMENT** Russell J.

DATED: August 11, 2011

APPEARANCES:

Hafeez Khan FOR THE APPLICANT

Brendan Friesen FOR THE RESPONDENT

SOLICITORS OF RECORD:

Booth Dennehy LLP FOR THE APPLICANT
Winnipeg, Manitoba

Myles J. Kirvan FOR THE RESPONDENT
Deputy Attorney General of Canada