Federal Court  Cour fédérale

Date: 20150702

Docket: IMM-7680-14

Citation: 2015 FC 812

[UNREVISED ENGLISH CERTIFIED TRANSLATION]

Montréal, Quebec, July 2, 2015

PRESENT: The Honourable Mr. Justice Martineau

BETWEEN:

SABRINA BENZABA
MUSTAPHA BELAHMAR

Applicants

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

[1] The applicants are challenging the legality of a decision of the Refugee Protection Division (RPD) of the Immigration and Refugee Board, dated October 23, 2014, in which the RPD held that the applicants were neither Convention refugees nor persons in need of protection under sections 96 and 97 of the *Immigration and Refugee Protection Act*, SC 2001, c 27.

[2] The applicants are citizens of Algeria. They say that they fear returning to their country because an influential businessman working for the national police (agent of persecution) threatened them with death following a favourable judgment received on October 24, 2010, by the applicant against him. On June 12, 2011, the applicant allegedly received an initial threatening phone call; a few weeks later, they applied for a visa. A second threatening call was made at about that time. On October 6, 2011, the applicant learned that a police officer was searching for him in Annaba. The applicant went to the police station, where he was allegedly told that there was nothing the police could do for him, that the agent of persecution was dangerous and that he should not leave his house. The same day, the applicants purchased their plane tickets for Canada and left Algeria on October 14, 2011. However, the applicants did not claim refugee protection immediately. After six months, they had their tourist visas extended. On April 24, 2012, the applicant learned that the agent of persecution was circulating freely; accordingly, on May 17, 2012, the applicants filed a claim for refugee protection.

[3] The claim for refugee protection was rejected without the RPD having really considered the issue of state protection, although it did note that, given the judgment of October 24, 2010, [TRANSLATION] "the Panel believes that the applicant was able to get justice in his own country". The RPD held that the applicants were not credible for the majority of their allegations and that they lacked a subjective fear of persecution. The RPD accepted the applicant's testimony and evidence regarding the fraud committed by the agent of persecution and the judgment that the applicant had obtained against him. However, the RPD noted certain inconsistencies and contradictions in the applicant's testimony with respect to the threatening calls and the complaints allegedly filed with the police. The RPD also noted that before receiving the initial

death threat on June 12, 2011, the applicants had already received, on June 3, 2011, an invitation from the female applicant's sister in Canada to come visit. In fact, the applicants submitted their visa application on July 1, 2011, but stated that they did not make their decision to leave the country until October 6, 2011. The RPD also criticizes the applicants for having waited seven months after arriving in Canada before claiming refugee protection. Finally, the RPD concluded that the medical and psychological reports filed by the applicant regarding his medical condition (epilepsy) and mental condition (memory problems) did not cast doubt on the applicant's ability to testify.

[4] The applicants criticize the RPD member for handling their file improperly; for presumptuously stating that the applicant had been able to obtain justice, when the agent of persecution was a police officer and an influential businessman; and for rejecting their claim for having found that the applicant lacked credibility on the basis of contradictions and inconsistencies in his testimony, while the medical and psychological reports filed in evidence show that the applicant has epilepsy and that his memory and ability to testify are greatly affected. The applicants also note that the RPD never raised its doubts as to whether the applicant had recently had epileptic seizures and that it therefore never gave them an opportunity to make submissions on that subject. The applicants allege that the psychological report clearly demonstrates the applicant's problems with his memory and cognitive ability. The RPD called into question the fact that the applicant had epilepsy because he failed to mention it in his claim for refugee protection. However, that fact was relevant not to the basis of the claim, but to the assessment of his oral testimony. The RPD also acted unreasonably in dismissing the relevance of the psychological report because of its proximity in time to the hearing. On the contrary, it

was normal for the psychological assessment to take place as close to the hearing date as possible to ensure that the evaluation of the applicant's ability to testify was not outdated or obsolete. Accordingly, the decision is unreasonable. According to the applicants' learned counsel, it is difficult to speculate on what the RPD might decide if the claim for refugee protection were to be returned to it. The role of this Court in judicial review is not to reassess the evidence or to substitute our own opinion for that of the RPD (*Hughes v Canada (Attorney General)*, 2014 FCA 43 at para 11).

[5] The respondent essentially contends that the RPD's findings were reasonable. According to the respondent, it was reasonable for the RPD to give no weight to the medical report because it was brief; the most it demonstrated was that the applicant may have had infantile epilepsy and it did not corroborate the fact that the applicant had experienced epileptic seizures recently. As for the psychological report, the respondent contends that it was reasonable to set it aside because the applicant had not consulted a psychologist at the time of his seizures in 2012 and 2013, instead waiting until shortly before the date set for the hearing, and also because the psychological report is not corroborated by the medical report. In the alternative, even if the RPD committed a reviewable error, this does not affect the validity of the RPD's other findings, and the applicants have failed to show how the alleged memory problems could have affected his ability to testify. It is clear that there are many contradictions. The rejection is also based on other important factors. The applicants lacked subjective fear because they had taken their first steps toward obtaining visas before the threats began and because they had waited seven months before making a refugee claim in Canada, and it is possible that the RPD would have reached the

same conclusion had it afforded a certain weight to the medical and psychological reports. Therefore, the application for judicial review should be dismissed.

[6] It is well established by the case law that this Court must show significant deference to the RPD's findings regarding credibility and the assessment of evidence. However, in this case I am of the view that the RPD committed a reviewable error by failing to give any weight to the medical and psychological reports and that this was determinative in this case. First, with respect to the medical report, even if it is brief and does not explicitly state that the applicant is currently experiencing epileptic seizures, it clearly states that the applicant consulted the specialist three times and that he is currently taking medication (Epival) for the treatment of "a presumed Juvenile Myoclonic Epilepsy", which suggests that the applicant has a serious illness that could affect his memory, according to the evidence in the record. Nothing in the evidence indicates that the specialist based this diagnosis and treatment solely on what he was told by the applicant rather than on objective factors. Second, with respect to the psychological report by Dr. Marta Valenzuela, nothing suggests that the psychologist was consulted for treatment, but rather for a diagnosis of the applicant's ability to testify, and the fact that the applicant waited until shortly before the hearing to obtain this report should not have resulted in a negative inference. Moreover, despite the frequency with which the RPD mentioned the precise dates of the applicant's alleged epileptic seizures in 2012, they are not relevant. Because Dr. Venezuela took into consideration objective factors over and above what the applicant told her, the RPD should not have set aside the psychological report on the basis of its finding with respect to the applicant's credibility (*Park v Canada (Citizenship and Immigration)*, 2010 FC 1269 at para 47). In this case, the purpose of the medical reports was not to corroborate the applicants' fears on the

merits (as would be the case, for example, for a medical report corroborating injuries relating to torture), but to explain the applicant's difficulties with testifying.

[7] As indicated by the Court in *Ameir v Canada (Minister of Citizenship and Immigration)*, 2005 FC 876 at para 27:

> It is open to the Board to afford no probative value to a medical report if that report is founded essentially on a claimant's story which is disbelieved by the Board. However, there may be instances where reports are also based on clinical observations that can be drawn independently of the claimant's credibility. In the instant case, Dr. Hirsz's medical report is based, at least in part, on independent and objective testing. In such cases, expert reports may serve as corroborative evidence in determining a claimant's credibility and should be dealt with accordingly before being rejected.

[8] I would also like to add the following to ensure that the scope of this decision is fully understood. In her report, Dr. Valenzuela states that she assessed the applicant's memory using the Wechsler Memory scale, and she concluded that the applicant's ability to testify was compromised and that it was likely that he would have difficulty remembering dates during his hearing. The RPD essentially performed its analysis backwards: instead of using the medical reports to assess the applicant's credibility, the RPD drew conclusions about credibility and then used those conclusions to reject the reports.

[9] It is also clear from reading the impugned decision that this error in the analysis may have had a negative impact on the outcome. If the RPD had used the medical reports to assess the applicant's credibility, it is possible that it would have accorded little weight to the inconsistencies in the applicant's testimony and found it to be credible. Indeed, the RPD does not

indicate in its decision that it would have reached the same conclusion if it had accepted the medical reports. Because the claim was principally rejected on the basis of credibility, the error in the consideration of the medical reports had an important impact on the RPD's findings. The respondent indicates that the RPD also considered other factors, such as the fact that the applicants had started taking steps to obtain visas before the threats began and that they had waited seven months before making a claim for refugee protection in Canada. However, these factors are also affected by the credibility of the applicant's testimony, and if the applicant had been found to be credible by the RPD, it is possible that it would have accepted his explanations for the chronology of his visa application and for the delay in claiming refugee protection. Moreover, the RPD was silent on the subjects of state protection and internal flight alternatives.

[10] However, as indicated by the respondent, it is also possible that the RPD would have concluded that the applicant was not credible even if it had accepted the medical reports, or that it would have rejected the claim for refugee protection even if it had found the applicant to be credible. However, it is not clear from the RPD's reasons that the decision would have been the same regardless of the error involving the medical reports, and it is not open to this Court to rewrite the RPD's reasons or substitute its own appreciation of the evidence. As indicated by this Court on many occasions, if there is no certainty that the result would have been the same had the RPD not committed its error, the decision must be returned to the panel for redetermination (*Barrak v Canada (Citizenship and Immigration)*, 2008 FC 962 at para 34; *Pathmanathan v Canada (Citizenship and Immigration)*, 2013 FC 353 at para 21; *Raju v Canada (Citizenship and Immigration)*, 2013 FC 848 at para 22; *Kovac v Canada (Citizenship and Immigration)*, 2015 FC 497 at para 8).

[11] Accordingly, the application for judicial review is allowed and the matter referred back to a different RPD panel for redetermination. Counsel agree that there is no question of general importance to certify.

JUDGMENT

THIS COURT'S JUDGMENT IS that the application for judicial review is granted. The decision of October 23, 2014, by the Refugee Protection Division is set aside and the matter referred back to the Immigration and Refugee Board for redetermination by a different panel. No question is certified.

"Luc Martineau"
Judge

Certified true translation
Francie Gow, BCL, LLB

FEDERAL COURT

SOLICITORS OF RECORD

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