Federal Court  Cour fédérale

Date: 20151016

Docket: IMM-8377-14

Citation: 2015 FC 1172

Ottawa, Ontario, October 16, 2015

PRESENT: The Honourable Mr. Justice Fothergill

BETWEEN:

H.A.K.

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Confidentiality Order

[1] The Applicant asserts that she will be at risk in Ethiopia if the authorities become aware that she has made a claim for refugee protection in Canada. She has therefore requested that she not be identified in this judgment by name. The Respondent does not object. The style of cause is amended accordingly, and she is referred to in these reasons as the Applicant.

II. Nature of the Matter

[2] The Applicant has brought an application for judicial review of a decision of the Refugee Appeal Division [RAD] of the Immigration and Refugee Board dated December 11, 2014. The RAD dismissed the Applicant's appeal and confirmed the decision of the Refugee Protection Division [RPD] that she is neither a Convention refugee under s 96 of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [the IRPA], nor a person in need of protection under s 97.

[3] For the reasons that follow, I have concluded that the RAD wrongly applied the standard of reasonableness to its review of many aspects of the RPD's analysis, and offered no independent analysis of its own. I am unable to say whether an independent assessment of the Applicant's claim would have changed the outcome of the appeal before the RAD. The application for judicial review is therefore allowed.

III. Background

[4] The Applicant is 35 years old and a citizen of Ethiopia. Before her arrival in Canada she was a flight attendant with Ethiopian Airlines. Her claim for refugee protection was based on the following contentions.

[5] In February, 2014, during a stop-over in Germany, the Applicant was seen by a co-worker in a coffee shop talking to other Ethiopians in the Amharic language. Her co-worker ordered her to end the conversation. She returned to Addis Ababa on February 17, 2014.

[6] On February 18, 2014, two security agents came to her home and took her to the Maekelawi political detention centre. She was held for seven days and questioned about her involvement in opposition groups. She was beaten and humiliated.

[7] The Applicant returned to work. On March 5, 2014 she flew to China and had a brief stop-over before returning to Ethiopia the following day.

[8] On March 13, 2014, the Applicant flew to South Africa. While on a stop-over in that country, the captain of the aircraft attempted to sexually assault her. She managed to escape to a co-worker's room. She reported the incident to the airline's management when she returned to Ethiopia, but no action was taken. She believed that this was because the captain was an influential member of the ruling party, the Tigrayan People's Liberation Front [TPLF].

[9] The Applicant fled Ethiopia on March 16, 2014. She travelled to Canada via Italy and arrived on March 18, 2014. She claimed refugee protection on April 4, 2014.

[10] The RPD dismissed the Applicant's refugee claim. Given her failure to seek refugee protection in China or South Africa, the RPD found that she lacked a subjective fear of persecution.

[11] The Applicant appealed the RPD's decision to the RAD on the ground that the RPD's conclusion regarding her lack of subjective fear was unreasonable. She also argued that the RPD had failed to properly consider the risks that she faced under s 97(1)(a) of the IRPA. In support

of her appeal, the Applicant submitted two letters from Ethiopian Airlines that were not before the RPD. The RAD refused to admit the new evidence and confirmed the RPD's decision that the Applicant is neither a Convention refugee nor a person in need of protection.

IV. Issues

[12] This application for judicial review raises the following issues:

A. Was the RAD's refusal to admit the new evidence reasonable?

B. Did the RAD apply the correct standard of review to its consideration of the RPD's decision?

A. *Was the RAD's refusal to admit the new evidence reasonable?*

[13] The new evidence offered by the Applicant consisted of (a) a letter of decision from Ethiopian Airlines dated July 15, 2014, and (b) a letter from Ethiopian Airlines confirming that the Applicant missed two flights between February 21, 2014 and February 25, 2014 (when she was allegedly detained at the Maekelawi political detention centre). The RAD found that the new evidence did not meet the requirements of s 110(4) of the IRPA because it related to circumstances that arose prior to the RPD's hearing and the Applicant did not provide a satisfactory explanation for her failure to present it before the RPD. The RAD also found that the letters, even if admitted, would carry little weight: the facts they described were vague, there

were numerous spelling errors, and they were not provided directly by the airline but by a third party.

[14] The RAD referred to the test for the admission of new evidence found in *Raza v Canada (Minister of Citizenship and Immigration)*, 2007 FCA 385 [*Raza*]. The law is not settled regarding the application of *Raza* to an appeal before the RAD, given that the test was developed in the context of a pre-removal risk assessment (see *Singh v Canada (Minister of Citizenship and Immigration)*, 2014 FC 1022 paras 55-58 [*Singh*] and *Denbel v Canada (Minister of Citizenship and Immigration)*, 2015 FC 629). This Court's decision in *Singh* is currently before the Federal Court of Appeal.

[15] Regardless of whether a strict or a more flexible application of the *Raza* test is preferred, I am satisfied that the RAD's rejection of the Applicant's explanation for not adducing the evidence before the RPD was reasonable. The only explanation she offered for her delay in obtaining the letters was that she did not think that the airline would provide her with the information. It was open to the RAD to reject this explanation as unsatisfactory. In any event, the Applicant's detention and the attempted sexual assault by the airline captain were both accepted by the RPD. The letters were therefore not probative of any fact in dispute.

B. Did the RAD apply the correct standard of review to its consideration of the RPD's decision?

[16] The law regarding the standard of review to be applied by this Court to the RAD's determination of its own standard of review is not settled. This Court's decision in *Huruglica v*

Canada (Minister of Citizenship and Immigration), 2014 FC 799 [*Huruglica*] is currently before the Federal Court of Appeal.

[17] Pending clarification by higher courts, it is my view that the RAD commits an error when it reviews the RPD's findings against the standard of reasonableness and fails to conduct its own assessment of the evidence. Some judges of this Court have held that the RAD does not commit a reviewable error when it applies the standard of reasonableness to findings of pure credibility. However, this Court will uphold the RAD's application of the reasonableness standard to the RPD's findings of credibility only when it is clear that the RAD has in fact conducted its own assessment of the evidence as a whole (*Shukurov v Canada (Minister of Citizenship and Immigration)*, 2015 FC 949 at paras 14 to 16).

[18] In this case, the RAD stated its intention to conduct its own assessment of the evidence and to determine independently whether the Applicant is a Convention refugee or a person in need of protection. However, it is not apparent from a review of the RAD's decision that this approach was followed in practice. Rather, it appears that the RAD applied the standard of reasonableness to its review of many aspects of the RPD's analysis, and offered no independent analysis of its own.

[19] In its consideration of whether it was reasonable for the Applicant not to seek refugee protection in China, the RAD deferred to the expertise of the RPD:

> [33] … The RPD is an expert body and is expected to have knowledge of refugee systems of foreign nations. The RAD finds that the Appellant's argument in this regard does not have merit.

[20] However, the RAD's own expertise is considered to be at least equal to, and generally to exceed, that of the RPD (*Huruglica* at para 49; *Njeukam v Canada (Minister of Citizenship and Immigration)*, 2014 FC 859 at para 14).

[21] The RAD's treatment of the RPD's failure to properly consider the Applicant's risk pursuant to s 97 of the IRPA was even more deferential. The RAD expressed regret that the RPD had not explicitly analysed this aspect of the Applicant's claim, but did not proceed to conduct its own independent assessment:

> [36] … While it is unfortunate that the RPD fails to mention Section 97(1)(a) of the IRPA in its reasons, the RAD finds that it is not fatal to its decision. The RPD clearly found that the Appellant was not at risk in Ethiopia on either section 96 or 97 grounds. The RPD provided sound reasons, and its findings were grounded in the evidence in the record.

[22] I am unable to say whether an independent assessment of the Applicant's claim would have changed the outcome of the appeal before the RAD. The application for judicial review must therefore be allowed.

JUDGMENT

THIS COURT'S JUDGMENT is that the application for judicial review is allowed and the matter is remitted to a differently-constituted panel of the RAD for re-determination. No question is certified for appeal.

"Simon Fothergill"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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