

Federal Court



Cour fédérale

Date: 20160628

Docket: IMM-5429-15

Citation: 2016 FC 728

Ottawa, Ontario, June 28, 2016

PRESENT: The Honourable Madam Justice Kane

BETWEEN:

SVITLANA KIVALO AND IVAN KIVALO

Applicant

and

**MINISTER OF CITIZENSHIP AND
IMMIGRATION**

Respondent

JUDGMENT AND REASONS

[1] The applicants, Svitlana Kivalo and her son, seek judicial review pursuant to section 72 of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [the Act] of the decision of the Refugee Appeal Division [RAD] dated November 16, 2015, which dismissed their appeal of the decision of the Refugee Protection Board [RPD] and confirmed that they were not Convention refugees.

[2] The applicants claimed refugee status on the basis of Ms. Kivalo's fear of abuse from her ex-common law partner, Igor. The RAD found that Ms. Kivalo's account of her relationship with Igor was not credible in light of all the evidence and that her delay in claiming protection detracted from her credibility. The RAD also agreed with the RPD's finding that Ms. Kivalo was generally lacking in credibility, a finding which extended to all parts of her testimony.

[3] On judicial review, the applicants submit that the RAD did not sufficiently assess the evidence and simply deferred to the RPD's microscopic analysis, resulting in unreasonable credibility findings, and that the evidence as a whole supports Ms. Kivalo's account of abuse by Igor.

[4] For the reasons that follow, the application is dismissed. The RAD conducted an independent assessment of the evidence as required and made reasonable credibility findings. It was reasonable for the RAD to defer to the RPD's credibility findings on issues where the RPD had an advantage in hearing the applicant's testimony and explanations.

I. Background

[5] The applicants are citizens of Ukraine. They arrived in Canada in June 2014 on valid visas, which were extended and eventually expired on April 3, 2015. They sought refugee protection in March 2015.

[6] The applicants' claim is based on a fear of risk and harm of domestic violence by Ms. Kivalo's ex-common law partner, Igor. Ms. Kivalo recounts that she met Igor soon after her

husband died in 2006. She married Igor in a church wedding within the year following her husband's death. She explains that it is not considered appropriate to engage in a new relationship so quickly and the marriage was never registered with the state.

[7] Ms. Kivalo claims that Igor became abusive in 2008 and recounts physical and sexual assaults.

[8] In June 2014, Ms. Kivalo left Ukraine with her youngest son. Her teenage children remained in Ukraine with her sister. The applicants arrived in Canada on temporary visas which were later renewed to facilitate their departure from Canada. They then claimed refugee protection in March 2015, claiming that Igor had threatened Ms. Kivalo and attacked her sister in February 2015.

The RPD decision

[9] The RPD found that Ms. Kivalo was not a credible witness due to several omissions and inconsistencies in her basis of claim [BOC] form, which were not reasonably explained; the lack of any persuasive evidence regarding her relationship with Igor; and, the delay in claiming protection until her temporary visa was about to expire.

[10] The RPD concluded that the documents provided by Ms. Kivalo to corroborate her claim did not overcome the credibility concerns. The RPD noted that:

- The residence certificate indicates that Igor is a cohabitant, but does not establish his relationship to Ms. Kivalo or that he was abusive.

- The medical booklets were handwritten and their author could not be verified. Ms. Kivalo's medical report for her injuries in Ukraine only contained information that she provided and she was not credible. Her sister's medical report did not contain information about Igor.
- The police responses provided were not accompanied by police reports and lacked details. The RPD rejected Ms. Kivalo's explanation that she thought it was only important to state that Igor beat her, not to provide the details.

[11] The RPD found that on a balance of probabilities the documents provided were false or fraudulent and attached no weight to them.

[12] The RPD noted the hallmarks of a credibility assessment, including omissions, inconsistency and vagueness, and concluded that Ms. Kivalo was generally lacking in credibility, a finding which extended to all relevant parts of her testimony.

II. The Decision Under Review

[13] The RAD stated that it would follow the Federal Court's decision in *Huruglica v Canada (Minister of Citizenship and Immigration)*, 2014 FC 799, [2014] 4 FCR 811 [*Huruglica FC*] and conduct an independent assessment of the evidence, affording deference to the RPD's findings on issues of credibility or to other findings where the RPD had an advantage in reaching its conclusions.

[14] The RAD questioned the credibility of the alleged relationship between Ms. Kivalo and Igor as no documentation was provided to establish its existence. The RAD found that, although Igor and Ms. Kivalo were not legally married, their relationship would be reasonably expected to be noted on the residence certificate.

[15] The RAD also agreed with the RPD that it was not credible that Ms. Kivalo would have omitted her common law partner from her Canadian visa applications, including the extension applications. Ms. Kivalo had lived with Igor for several years as his common law spouse and, although the marriage had not been registered, the visa application requires that all common law relationships be listed.

[16] The RAD found the lack of documentation regarding the church marriage and years of cohabitation to be compelling.

[17] With respect to Ms. Kivalo's testimony and lack of awareness about Igor's use of his patrimonial name, which the RPD had found to be the basis of a negative credibility inference, the RAD also found this to be an indication that her description of her relationship and abuse by Igor was not credible.

[18] The RAD concluded, on a balance of probabilities, that Ms. Kivalo did not have the relationship she alleged.

[19] The RAD did not agree with the RPD's finding that the medical documents were fraudulent. However, assuming the medical documentation was genuine, the RAD found that it did not establish or corroborate that Igor was the cause of Ms. Kivalo's injuries, noting that it was Ms. Kivalo who told the medical personnel that Igor was the cause. With respect to her sister's injuries, the RAD noted that there was no mention on the document of who caused the injuries. It was only Ms. Kivalo who stated that Igor caused the injuries and she was not credible.

[20] The RAD agreed with the RPD's findings regarding the police responses. The RAD noted that the September 2012 request for police intervention lacked details and Ms. Kivalo's explanation was not credible. The RAD also found that the lack of police reports to substantiate the investigations and measures taken was compelling. Given the credibility findings, the RAD gave no weight to the police documents as proof that Igor was the abuser or that the events occurred as Ms. Kivalo described.

[21] The RAD also agreed with the RPD's finding that Ms. Kivalo's delay in claiming protection did not demonstrate subjective fear of her situation in Ukraine. She only made a claim for refugee protection when faced with expulsion from Canada.

III. The Issues

[22] The sole issue is whether the decision of the RAD is reasonable.

[23] The applicants argue that the RPD erred in its assessment of the evidence and in deferring to the findings of the RPD regarding the applicant's credibility.

IV. The Standard of Review

[24] The RAD is tasked with conducting an appeal of the RPD's decision. The Court conducts a judicial review of the RAD's decision.

[25] In the recent decision *Canada (Minister of Citizenship and Immigration) v Huruglica*, 2016 FCA 93 at para 103, [2016] FCJ No 313 (QL) [*Huruglica FCA*], Justice Gauthier clarified the uncertainty regarding the standard of review to be applied by the RAD; the RAD should fulfill its appellate role and apply the standard of correctness when reviewing RPD decision.

[26] With respect to deference owed to the RPD's credibility findings, *Huruglica FCA* does not dictate a single standard of review. Justice Gauthier described several scenarios at paras 69-73 to highlight the situations where the RAD should consider deference to the RPD and, alternatively, where the RAD should be cautious in substituting its decision.

[27] Justice Gauthier noted at para 70, that with respect to whether deference is owed to the RPD: "In each case, the RAD ought to determine whether the RPD truly benefited from an advantageous position, and if so, whether the RAD can nevertheless make a final decision in respect of the refugee claim." Justice Gauthier added at para 74: "The RAD should be given the opportunity to develop its own jurisprudence in that respect; there is thus no need for me to pigeon-hole the RAD to the level of deference owed in each case."

[28] In the present case, the RAD did not have the benefit of the Court of Appeal's decision and was guided by the decision of this Court in *Huruglica FC*. However, the requirement for an independent assessment of the evidence confirmed by the Court of Appeal was established in the Federal Court's decision. The RAD indicated that it would conduct an independent assessment and would defer to the RPD on its credibility findings where the RPD enjoyed an advantage.

[29] The RAD's determinations of factual issues, including credibility, and issues of mixed fact and law are also reviewed on the reasonableness standard.

[30] The reasonableness standard focuses on "the existence of justification, transparency and intelligibility within the decision-making process" and considers "whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law" (*Dunsmuir v New Brunswick*, 2008 SCC 9 at para 47, [2008] 1 SCR 190). The Court will not re-weigh the evidence or re-make the decision.

V. The Applicants' Submissions

[31] The applicants argue that there was sufficient credible evidence to support their allegations and that the RAD deferred to the RPD's microscopic analysis and did not consider that cumulatively, the evidence supports Ms. Kivalo's account of abuse by Igor. In particular, the RAD erred in discounting the corroborative evidence, including the medical booklet, due to its credibility findings and erred in finding that Ms. Kivalo's delay in claiming refugee protection demonstrated lack of subjective fear.

[32] The applicants submit that the RAD erred by finding Ms. Kivalo's testimony to not be credible without considering the medical documentation as relevant corroborating evidence. The applicants point to the notations regarding her injuries that were contemporaneous with her account of abuse, including several abortions that Igor forced her to undergo.

[33] The applicants add that the RAD unreasonably dismissed the police evidence which corroborates that Ms. Kivalo did make a complaint to the police of abuse by Igor.

[34] The applicants argue that the corroborating documents should have been assessed and considered by the RAD before it made its credibility findings, rather than simply deferring to the RPD. Corroborating documents cannot be discounted because of the credibility concerns about an applicant (*Kabongo v Canada (Minister of Citizenship and Immigration)*, 2012 FC 313, [2012] FCJ No 367 (QL) [*Kabongo*]).

[35] The applicants submit that it was unreasonable to draw negative credibility findings from the fact that Igor is listed as a cohabitant rather than as a common-law spouse on the residence certificate given that common-law relationships are not accepted in Ukraine. Moreover, the residence certificate was not tendered to establish the relationship, only that Igor lived in her house.

[36] The applicants also argue that their delay in claiming refugee protection did not demonstrate lack of subjective fear. They were legally in Canada on visas which were extended up to March 2015 and they were not at risk of returning to Ukraine at that time.

VI. The Respondent's Submissions

[37] The respondent submits that the RAD conducted an independent assessment of the evidence and the subsequent decision of the Federal Court of Appeal in *Huruglica FCA* does not change the reasonableness of its analysis.

[38] The respondent notes that the RAD deferred to several of the RPD's findings, particularly on issues where the RPD had an advantage, including the omissions and inconsistency in Ms. Kivalo's testimony before the RPD and the RPD's rejection of her explanations. The RAD also conducted an independent assessment of the documentary evidence and reached the same conclusions as the RPD, with the exception of the genuineness of the medical booklet.

[39] The respondent notes that the RAD acknowledged that common law relationships are not recognized in Ukraine, yet reasonably found that Igor would be listed as something other than a cohabitant if Ms. Kivalo and Igor had a church wedding and resided together for over five years. The respondent notes that Ms. Kivalo did not refrain from naming her current common law partner on her more recent application for a visitor's visa.

[40] The respondent disputes the applicants' submission that cumulatively, the evidence supports only the conclusion that Ms. Kivalo's injuries were caused by Igor. Although the RAD did not find that the medical booklet was fraudulent, it was open to the RAD to conclude that the medical documentation did not verify that Igor was the cause of Ms. Kivalo's injuries or those of

her sister, given that she reported her injuries to medical personnel and her sister's document did not indicate the name of the person who caused the injury.

[41] The respondent submits that the RAD did not err by discounting the medical booklet or the police reports tendered as corroborating evidence. The respondent distinguishes *Kabongo*; in that case the RPD gave no weight to an arrest warrant, which was an independent corroborative document of the information provided by the applicant. A medical report does not necessarily corroborate an applicant's allegations where the report depends on the credibility and trustworthiness of the information provided by an applicant to the medical professional.

[42] The respondent adds that the RAD was entitled to take into account the applicants' delay in claiming refugee status, along with the other factors it considered. The RAD reasonably concluded that Ms. Kivalo had not demonstrated subjective fear of her situation in Ukraine which impacts her credibility.

VII. The Decision is Reasonable

[43] The RAD conducted an independent assessment of the evidence on the record and deferred to several of the credibility findings of the RPD. As noted above, the RPD found Ms. Kivalo's testimony inconsistent, some of her accounts to be implausible, several omissions in her BOC and her explanations to be unreasonable. The RAD reasonably found that the RPD had not erred in its credibility findings or other findings, with the exception of its finding that the medical documentation could be fraudulent.

[44] I do not agree that the RAD simply deferred to the RPD's analysis; the RAD conducted an independent assessment of all the evidence and deferred to the RPD where appropriate, based on the RPD's advantage in hearing the applicant's testimony, responses to questions and explanations.

[45] Ms. Kivalo argued that the medical records of her injuries, combined with the evidence of the police response, which could only be a response to her reports of violence by Igor, along with her other evidence leads only to the conclusion that she suffered the domestic abuse she recounted. However, the RAD reasonably found that there was no sufficient or credible evidence of Ms. Kivalo's marriage or common law relationship with Igor.

[46] Although it may not have been possible for Ms. Kivalo to list Igor as a common law partner on her residence certificate, the residence certificate could still not assist in establishing any relationship with Igor. As noted by the RPD and RAD, the certificate was issued to and listed Ms. Kivalo's teenage daughter as the applicant for the certificate. The RAD did not err in questioning the residence certificate.

[47] With respect to the applicants' argument that the RAD erred in discounting the medical evidence due to its credibility concerns, rather than considering the corroborative evidence first and then determining the credibility of the applicant, I agree with the respondent that *Kabongo* can be distinguished.

[48] In *Kabongo*, Justice Rennie found that the RPD erred by failing to consider that the applicant's testimony was corroborated by a warrant for his arrest. Justice Rennie found: "[t]he warrant was itself highly relevant to the credibility of his testimony. The Board cannot find the applicant's testimony not credible without consideration of relevant corroborative evidence, and then subsequently reject the supporting evidence because of the credibility finding."

[49] In the present case, the RAD found that Ms. Kivalo was not credible, and then found that her medical booklet which reported her injuries and Igor as the abuser to be not credible. The RAD did not fail to consider the medical booklet. However, the medical booklet's reference to Igor as the cause of her injuries (or some of her injuries) is not independent evidence, as is an arrest warrant. Ms. Kivalo's statement to medical personnel that Igor caused her injuries, therefore, cannot corroborate her other accounts, which the RAD considered and found not credible, that Igor caused her injuries. The RAD made many credibility findings against Ms. Kivalo and her credibility cannot be rehabilitated by relying on her own discredited account.

[50] As noted by the respondent, the jurisprudence has cautioned that the recounting of events to medical personnel does not make these events more credible and that the resulting medical report cannot confirm allegations of abuse. For example, in *Rokni v Canada (Minister of Citizenship and Immigration)*, [1995] FCJ No 182 (QL), 53 ACWS (3d) 371 (FCTD), and *Danailov v Canada (Minister of Employment and Immigration)*, [1993] FCJ No 1019 (QL), 44 ACWS (3d) 766 (FCTD), the Court noted that opinion evidence is only as valid as the truth of the facts upon which it is based.

[51] Similarly, the RAD reasonably gave little weight to the police responses to Ms. Kivalo's complaints. The documents, which were not police reports, were insufficient to establish that Igor was the abuser or that the events occurred as alleged.

[52] The RAD did not err in finding that Ms. Kivalo's delay in claiming refugee protection demonstrated lack of subjective fear.

[53] Justice Zinn provided a helpful summary of the law regarding delay in claiming protection in *Gurung v Canada (Minister of Citizenship and Immigration)*, 2010 FC 1097, [2010] FCJ No 1368 (QL), noting at para 21 that delay may be a valid factor to consider, but delay does not automatically result in a finding of lack of subjective fear. The circumstances and explanations for the delay must be considered. At paras 22-23, Justice Zinn noted the jurisprudence that established the principle that having temporary status in Canada and not being subject to immediate removal was not a sufficient explanation for a delay in failing to make a refugee claim, but he found that the circumstances of the temporary status must be considered to determine whether this shows a lack of subjective fear.

[54] In the present case, the RAD considered Ms. Kivalo's explanation for her delay in claiming protection and found that it was not reasonable. Ms. Kivalo had come to Canada on a temporary visa which was extended at least twice, the last time to permit her to return to Ukraine on a particular date as planned. Ms. Kivalo did not mention Igor in any of her visa applications or extension applications. She did not make a refugee claim naming Igor as her common law partner or abuser until faced with the requirement to leave Canada.

[55] With respect to the applicants' submission that, cumulatively, there was sufficient evidence to support Ms. Kivalo's account of abuse by Igor, I do not agree that the RAD failed to properly assess Ms. Kivalo's credibility in the context of all the evidence. The RAD made many credibility findings, including related to Ms. Kivalo's failure to name Igor on the visa applications, her lack of awareness of Igor's patrimonial name, the absence of any documentation of a relationship with Igor and her delay in claiming refugee protection. None of these findings related to evidence which could corroborate that she was in a relationship with Igor or that Igor was the cause of her injuries.

[56] While the applicants argue that there was no other reasonable conclusion, the RAD reasonably found otherwise. The RAD also deferred to the RPD, based on its assessment of Ms. Kivalo's testimony and the documentary evidence, which went so far as to find that she was generally lacking in credibility, which extended to all aspects of her claim.

[57] The jurisprudence in the context of judicial reviews of RPD decisions and those of other tribunals that have heard the testimony and assessed the credibility of an applicant guides the Court to show significant deference to such findings (*Aguebor v Canada (Minister of Employment and Immigration)* , [1993] FCJ No 732 at para 4, 160 NR 315 (FCA)); *Lin v Canada (Minister of Citizenship and Immigration)*, 2008 FC 1052 at para 13, [2008] FCJ No 1329 (QL); *Fatih v Canada (Minister of Citizenship and Immigration)*, 2012 FC 857 at para 65, [2012] FCJ No 924 (QL)). I see no reason to take a different approach to credibility findings confirmed by the RAD following its independent assessment of the evidence on the record or where the RAD defers to the RPD based on its assessment.

JUDGMENT

THIS COURT'S JUDGMENT is that the application for judicial review is dismissed.

There is no question for certification.

"Catherine M. Kane"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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