

Federal Court



Cour fédérale

Date: 20160722

Docket: IMM-349-16

Citation: 2016 FC 868

Ottawa, Ontario, July 22, 2016

PRESENT: The Honourable Mr. Justice Southcott

BETWEEN:

SHAVEL ROBINSON

Applicant

and

**THE MINISTER OF CITIZENSHIP AND
IMMIGRATION**

Respondent

JUDGMENT AND REASONS

I. Overview

[1] The Applicant, Ms. Shavel Robinson, is a citizen of Jamaica. She applied for refugee protection following the murder of her uncle, which she alleges was arranged by two other relatives. She fears persecution and alleges that her life is at risk as a result of a family dispute to which she attributes her uncle's murder. She also fears she may be perceived to be a witness in any future prosecution.

[2] The Refugee Protection Division of the Immigration and Refugee Board of Canada [RPD] rejected Ms. Robinson's refugee claim. She appealed to the Refugee Appeal Division [RAD], which dismissed her appeal, and is now seeking judicial review of the RAD's decision. She argues that the RAD erred in failing to allow her refugee claim under section 96 of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA] as a victim of gender-related violence, in failing to admit new evidence submitted in the appeal, and in rejecting her claim for protection under section 97 of IRPA for lacking credibility without considering the danger she may face in the future. Ms. Robinson also submits that the RAD erred in its selection and application of the standard of review applicable to its assessment of the RPD's decision.

[3] For the reasons explained below, I am dismissing this application for judicial review. I have identified no reviewable error on any of the grounds argued by Ms. Robinson and find the decision reasonable.

II. Background

[4] Ms. Robinson's uncle Arnold, a Canadian citizen, owns land in Jamaica on which he started raising chickens. Ms. Robinson, her cousin Brittania and her uncle Winston were responsible for running Arnold's affairs when he was not in Jamaica. Ms. Robinson and her cousin Brittania were under Arnold's and Winston's care and were also allegedly the beneficiaries of his estate.

[5] At her RPD hearing, Ms. Robinson alleged that there was animosity between her aunt Gayan and Gayan's husband, Tyrone, and the rest of the family. She testified to several

background events involving violence and threats. In November 2014, on a weekend when Ms. Robinson had informed her family that she would be coming home from university, Winston was stabbed to death by unknown assailants who broke into the house where the family lives. Ms. Robinson had been unexpectedly detained at university and alleges that Gayan and Tyrone were behind Winston's murder and had intended to kill her too.

[6] Ms. Robinson alleges that the Jamaican police advised her family that they had received threats of further violence at Winston's funeral. She subsequently came to Canada in December 2014 and, after being informed that the murder investigation was ongoing and that she was still in danger, she made a claim for refugee protection in May 2015.

III. Issues

[7] Ms. Robinson's submissions raise the following issues to be decided in this judicial review:

- A. Did the RAD err in its selection and application of the standard of review applicable to its assessment of the RPD's decision?
- B. Did the RAD err in failing to allow her refugee claim under section 96 of IRPA as a victim of gender-related violence?
- C. Did the RAD err in failing to admit new evidence submitted in the appeal?

- D. Did the RAD err in rejecting her claim for protection under section 97 of IRPA for lacking credibility without considering the danger she may face in the future?

IV. Analysis

- A. *Did the RAD err in its selection and application of the standard of review applicable to its assessment of the RPD's decision?*

[8] Based on the recent decision of the Federal Court of Appeal in *Huruglica v Canada (Minister of Citizenship and Immigration)*, 2016 FCA 93 [*Huruglica*], Ms. Robinson argues that the RAD's consideration of the RPD's decision involved findings of fact and mixed fact and law and that the RAD should have applied a correctness standard of review rather than one of reasonableness.

[9] The Respondent takes the position that *Huruglica* limited the application of the correctness standard to circumstances where issues of credibility were not engaged. The Respondent submits that correctness may apply to the RAD's consideration of whether to admit new evidence or whether section 96 applies to Ms. Robinson's claims, but that the standard of reasonableness applies to the RAD's consideration of the RPD's credibility findings.

[10] In its decision, which was issued before the Federal Court of Appeal had ruled in *Huruglica*, the RAD relied on the Justice Phelan's decision in that case (*Huruglica v Canada (Minister of Citizenship and Immigration)*, 2014 FC 799) in concluding that it must conduct its

own independent assessment and determine whether Ms. Robinson is a Convention refugee or a person in need of protection, giving deference to the credibility findings of the RPD or to other findings where the RPD has a particular advantage in reaching its conclusions. This Court has had to consider how to approach cases, like this one, where the RAD based its approach to standard of review on Justice Phelan's decision before the appellate decision in *Huruglica* was released. In *Gabila v Canada (Minister of Citizenship and Immigration)*, 2016 FC 574 [*Gabila*] at paras 19-21, Justice Diner stated:

[19] As a preliminary matter, the Federal Court of Appeal recently clarified that the standard of review the RAD should apply when reviewing RPD decisions is correctness, conducting "its own analysis of the record to determine whether, as submitted by the appellant, the RPD erred" (*Canada (Citizenship and Immigration) v Huruglica*, 2016 FCA 93 at para 103 [*Huruglica FCA*]). The RAD's selection of a standard of review must then be reviewed by this Court on a reasonableness standard (*Huruglica FCA* at para 35).

[20] In the decision at issue, the RAD selected and applied the standard laid out in *Huruglica FC* at para 54, a standard that has since been supplanted by the approach offered in *Huruglica FCA*. Selecting the *Huruglica FC* standard does not mean that the RAD has committed a reviewable error: so long as the RAD conducted, in substance, a thorough, comprehensive, and independent review of the kind endorsed in *Huruglica FCA*, the RAD's selection of a standard of review was reasonable (*Ketchen v Canada (Citizenship and Immigration)*, 2016 FC 388 at para 29). I agree with the parties that the RAD did not err on this point: it had the full record before it, including a recording of the RPD hearing, and conducted an independent assessment throughout.

[21] As for the RAD's assessment of the evidence, it is reviewable on a reasonableness standard (*Vushaj v Canada (Citizenship and Immigration)*, 2016 FC 255 at para 10; *Cortes v Canada (Citizenship and Immigration)*, 2015 FC 1325 at para 13). As such, if the RAD's decision on these points is an acceptable and rational solution that is justifiable, transparent and intelligible, it should not be disturbed (*Dunsmuir v New Brunswick*, 2008 SCC 9 at para 47 [*Dunsmuir*]).

[Emphasis added.]

[11] As in *Gabila*, the RAD in the present case reviewed the record that was before the RPD, including Ms. Robinson's testimony, and Ms. Robinson has not established that its decision fails to demonstrate an independent assessment of the evidence, consistent with the standard it identified it was adopting. I therefore find no error in the RAD's selection or application of the standard of review. I also note, as expressed by Justice Diner at paragraph 21 of *Gabila*, that the RAD's own assessment of the evidence is reviewable by this Court on a reasonableness standard.

B. *Did the RAD err in failing to allow her refugee claim under section 96 of IRPA as a victim of gender-related violence?*

[12] The RPD found that Ms. Robinson had not established a link between her claim and a Convention ground, as a result of which her claim failed under section 96. It considered her argument that she should be considered a member of a particular social group as a girl facing gender violence. However, the RPD noted that her testimony was that her uncle Tyrone made unwanted advances and statements towards her in 2006, not that he did anything to her physically. As the reason she was presently fearful was her belief that Tyrone and Gayan wished to kill her, the RPD concluded from her evidence that her allegations are that she is a victim of a personal vendetta, which did not engage section 96.

[13] The RAD considered this conclusion by the RPD and noted that Ms. Robinson did not make any submissions on this issue in her Memorandum of Appeal. She disagrees with this statement, referring the Court to paragraphs in her affidavit and Memorandum submitted to the RAD. However, those paragraphs take issue with the RPD's rejection of her claim based on credibility because she could not provide evidence of physical harm resulting from an event that

occurred when she was 11 years old. In her Memorandum, she characterizes this as the RPD relying on trivial errors and failing to apply the UNHCR guidelines on gender-related persecution [Gender Guidelines]. Ms. Robinson has not referred the Court to any submissions made to the RAD that her claim should be characterized as related to gender violence so as to fall under section 96.

[14] Nevertheless, the RAD did consider the claim from this perspective, noting Ms. Robinson's submissions that the RPD erred in relying on trivial errors, including her inability to give evidence of events when Tyrone made unwanted advances towards her. The RAD noted that the RPD found these allegations did not support that Ms. Robinson should be considered a member of a particular social group, as a girl facing gender violence. The RAD concurred with the RPD, finding that there was no documentation to support her allegations of this occurrence and that, in reviewing her testimony and the narrative in her Basis of Claim form, the basis of her claim was fear of persecution and death from her relatives, not gender-related persecution. The RAD therefore found that her claim under section 96 failed.

[15] On this judicial review, Ms. Robinson argued that the RAD erred in failing to apply the Gender Guidelines, referring to a section to the effect that sex can be within the ambit of the social group category. She also submitted that the fact the incident with Tyrone took place long ago does not take her claim outside the scope of section 96.

[16] However, I do not read RAD's decision as concluding either that gender-related violence is outside the scope of section 96 or that Ms. Robinson's claim is outside that scope because of

when it happened. Rather, based on her testimony and Basis of Claim narrative, it concluded that the basis of her claim was not one of gender-related violence. The Respondent points out that Ms. Robinson's only testimony before the RPD on this issue is one statement that in 2006 her aunt's husband started making advances at her and would use insulting language. Her Basis of Claim narrative contains no mention of this incident or any other gender-related incidents and focuses entirely on her fear for her life resulting from Winston's murder and surrounding threats and events. I find no basis for a conclusion that the RAD erred in its decision on this issue.

C. Did the RAD err in failing to admit new evidence submitted in the appeal?

[17] Ms. Robinson argues that the RAD erred in failing to admit into evidence a report of a private investigator, bank statements from an account held by her and Arnold, and a valuation of Arnold's property, as they met the requirements of section 110(4) of IRPA for admission of new evidence on appeal. Section 110(4) permits introduction of new evidence only if it arose after the RPD's rejection of the claim or was not reasonably available, or if the claimant could not reasonably have been expected to have presented it, at the time of the rejection.

[18] The RAD considered the bank statements and the valuation and declined to accept them into evidence for various reasons, including a finding (based on their dates) that they could reasonably have been expected to be available at the time of the RPD hearing or before the claim was rejected. There is no basis for the Court to interfere with this finding.

[19] With respect to the private investigator's report, Ms. Robinson argues that the RAD allowed form to dictate over substance, when it rejected this report based on it not being

notarized or on a business letterhead and based on the identity, occupation and role of the author not being substantiated. She notes that the report bears the signature of the apparent author and that of another individual who has written “JP” (argued to stand for Justice of the Peace) after his or her name.

[20] The Respondent takes issue with Ms. Robinson raising these specific arguments surrounding the private investigator’s report, as they were not contained in her written submissions, and submits that the Court should not consider them. However, as the Respondent proceeded to address these arguments with what I consider to be a compelling response, I prefer to address this issue on the merits.

[21] Unlike the other new evidence, the RAD did not reject the report as a result of its timing, as it was dated after the RPD’s decision. However, it applied the factors identified in *Raza v Canada (Citizenship and Immigration)*, 2007 FCA 385, which have recently been approved by the Federal Court of Appeal in *Canada (Citizenship and Immigration) v Singh*, 2016 FCA 96 as applying to the consideration of the admissibility of new evidence under section 110(4). These factors require consideration of whether the new evidence is credible, relevant and material.

[22] The RAD refused to accept the report as new evidence because of its lack of credibility and probative value. As the Respondent points out, the RAD reached this conclusion not just based on the analysis of the form of the document, but also based on its content. The RAD noted that Ms. Robinson submitted that the investigator was working with the police but found that this was not substantiated by the report, in which the investigator refers to speaking with the police

and discovering that they were unable to protect Ms. Robinson and her cousin. The RAD also observed that the investigator does not identify who allegedly called him in to assist in the investigation. Taken in combination with the RAD's findings with respect to the form of the document itself, I can find no reviewable error in the RAD's analysis.

D. *Did the RAD err in rejecting her claim for protection under section 97 of IRPA for lacking credibility without considering the danger she may face in the future?*

[23] Ms. Robinson argues that the rejection of her claim for lack of credibility is unreasonable, because a claimant need not show evidence of past persecution before being entitled to protection. The difficulty with Ms. Robinson's assertion of this principle in the present case is that her allegation of fear and resulting claim for protection are based on her descriptions of past events surrounding her uncle's murder and the connection with Tyrone and Gayan. The RAD found that, other than the murder itself, these descriptions were not credible. Without the credibility findings being impugned, there is no basis for interference with the RAD's conclusion that she is not a person in need of protection.

[24] With respect to the credibility findings, Ms. Robinson argues that the RAD erred in failing to place probative value on a corroborative letter from a Jamaican police inspector, because it was not an official police report and was written in an ambiguous manner. This is an argument as to the weight to be given to the documentary evidence, which is not a basis for the Court to intervene on judicial review. Ms. Robinson also argues that this letter should have been

considered in combination with the report of the private investigator. However, as noted above, the RAD did not admit the investigator's report into evidence.

[25] In summary, Ms. Robinson has not raised arguments that present a basis for finding the RAD's decision to be unreasonable. This judicial review must accordingly be dismissed. Neither party proposed any question for certification for appeal, and none is stated.

JUDGMENT

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

No question is certified for appeal.

“Richard F. Southcott”

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: IMM-349-16

STYLE OF CAUSE: SHAVEL ROBINSON v THE MINISTER OF
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