

Federal Court



Cour fédérale

Date: 20160909

Docket: IMM-533-16

Citation: 2016 FC 1024

Ottawa, Ontario, September 9, 2016

PRESENT: The Honourable Mr. Justice Gleeson

BETWEEN:

SANDRA PESTOVA

Applicant

and

**THE MINISTER OF CITIZENSHIP AND
IMMIGRATION**

Respondent

JUDGMENT AND REASONS

I. Overview

[1] Sandra Pestova is a citizen of the Czech Republic of Roma ethnicity. She arrived in Canada in August 2014 to visit relatives and to escape from her former husband who was physically and emotionally abusive. Ms. Pestova claims the harassment and abuse continued

after her divorce in 2011 and that her former husband's threats continued after her arrival in Canada.

[2] Ms. Pestova made an inland Convention refugee claim in March 2015 after she was unsuccessful in obtaining an extension to her visitor's visa. Her claim was based on a fear of harm from her former husband. In addition, she alleged that she faced discrimination and harm in the Czech Republic on the basis of her Roma ethnicity.

[3] The Refugee Protection Division [RPD] of the Immigration and Refugee Board of Canada [IRB] heard her claim in four separate sessions. The RPD ultimately rejected the claim. The RPD found that Ms. Pestova lacked credibility as her Basis of Claim form [BOC] omitted significant detail, her testimony before the RPD was inconsistent, and she had delayed in making her claim. The RPD further concluded that Ms. Pestova had not established that her personal circumstances linked her to the discrimination and persecution faced by some Czech Roma.

[4] Ms. Pestova appealed the RPD's findings to the Refugee Appeal Division [RAD] of the IRB in September 2015. The RAD upheld the RPD decision, concluding that Ms. Pestova did not establish with credible and trustworthy evidence that she faced discrimination or persecution in the Czech Republic.

[5] Ms. Pestova asks that this Court quash the decision of the RAD and return the matter for reconsideration. Ms. Pestova raises a number of issues in her written submissions, many relating to the RPD decision not to the RAD decision, the subject of this application. In oral submissions,

Ms. Pestova's counsel argued that the RAD's credibility findings were unreasonable and that the RAD erred in failing to link her personal circumstances to the documentary country conditions evidence. Ms. Pestova also submits the RAD erred in not conducting an oral hearing.

[6] In considering the application, the following issues shall be addressed:

- A. Were the RAD's credibility findings reasonable?
- B. Did the RAD err by failing to consider Ms. Pestova's Roma ethnicity?
- C. Did the RAD err in not conducting an oral hearing?

[7] Having considered the oral and written submissions of the parties, I conclude that the RAD did not err. The decision was reasonable. Ms. Pestova's application is dismissed for the reasons that follow.

II. Standard of Review

[8] This Court reviews decisions of the RAD that engage questions of fact and mixed fact and law on a reasonableness standard (*Canada (Citizenship and Immigration) v Huruglica*, 2016 FCA 93, at para 35 [*Huruglica FCA*], *Gabila v Canada (Minister of Citizenship and Immigration)*, 2016 FC 574 at para 21 and *Lu v. Canada (Minister of Citizenship and Immigration)*, 2016 FC 846 at para 18). Similarly a tribunal's interpretation of its home statute is reviewed on a reasonableness standard, subject to certain specific exceptions none of which apply here (*Dunsmuir v New Brunswick*, 2008 SCC 9 [*Dunsmuir*]).

III. Analysis

A. *Were the RAD's credibility findings reasonable?*

[9] Relying on Justice Michael Phelan's decision in *Huruglica v Canada (Citizenship and Immigration)*, 2014 CF 799 [*Huruglica FC*], the RAD noted that it "... will review all aspects of the RPD's decision and come to an independent assessment of the Appellant's refugee claim, recognizing and respecting the conclusion of the RPD on such issues as credibility and/or where the RPD enjoys a particular advantage in reaching such a conclusion."

[10] The RAD addressed four areas where the RPD made negative credibility findings: (1) the delay in making the claim; (2) the evidence relating to Ms. Pestova's Facebook account; (3) the inconsistent testimony before the RPD; and (4) the omissions from her BOC. In each case, the RAD conducted a review of the evidence and ultimately concurred with the RPD's credibility findings.

[11] Ms. Pestova argues that these negative credibility findings were the result of an overly vigilant and unreasonably microscopic examination of the evidence and represent a misconstruing of the evidence without considering the *Chairperson's Guidelines on Women Refugee Claimants Fearing Gender-Related Persecution* [*Chair's Gender Guidelines*]. She further argues that the RAD simply rubber-stamped the RPD's credibility findings. I cannot agree.

[12] The RAD undertook an extensive review of the evidence, individually addressing and considering the RPD's credibility findings. While the RAD recognized the need to be respectful of the RPD's findings where it enjoyed a particular advantage (*Huruglica FCA* at paras 69-70), the decision reflects a full review of the record and consideration of the evidence. The RAD turned its mind to the *Chair's Gender Guidelines* and the requirement to consider gender-based claims with sensitivity. As the RAD noted, the *Chair's Gender Guidelines* do not shield a claimant's testimony from scrutiny or preclude a credibility assessment (*Karanja v Canada (Minister of Citizenship and Immigration)*, 2006 FC 574 at para 5).

[13] In this case, it was reasonably open to the RAD to conclude that Ms. Pestova's seven month delay in claiming protection undermined both her subjective fear and overall credibility. The RAD considered that Ms. Pestova based her claim on: (1) fear of a former husband who had stalked and harassed her in various locations in the Czech Republic for more three years; and (2) persecution based on her Roma ethnicity. The RAD also considered that her explanation for the delay was a hope that things would settle down with her former husband. The RAD rejected Ms. Pestova's explanation and concluded that the circumstances would reasonably lead to a claimant making an immediate claim for protection.

[14] I cannot find fault with this conclusion. The persecution Ms. Pestova alleged related to a former-husband who she claims had pursued her for years and her ethnicity which she claimed had caused her to be subjected to persecution throughout her life. There was a solid evidentiary basis supporting the RAD's conclusion that Ms. Pestova's delay in claiming protection undermined her credibility.

[15] Similarly, it was reasonably open to the RAD to find that Ms. Pestova's credibility was negatively impacted where she testified that her Facebook account had been deleted prior to her RPD hearing. On this issue, the RPD had requested verifications by the IRB Research Directorate following the first sitting of the hearing. The research evidence confirmed that the account had been deleted at some point subsequent to the RPD's first sitting, not prior to the hearing as Ms. Pestova had testified. The result of the research was disclosed well in advance of the following sitting. The RAD reasonably concluded that the research into Ms. Pestova's Facebook use was not unfair or a denial of natural justice. Similarly, it was reasonably open to the RAD to draw a negative credibility inference based on the findings of the IRB Research Directorate.

[16] With respect to the inconsistencies in Ms. Pestova's testimony before the RPD and omissions from her BOC, the RAD reviewed each of these findings. In reviewing the RPD's findings, the RAD addressed Ms. Pestova's explanations, considered and weighed the evidence. In the circumstances, it was reasonably open to the RAD to conclude that the inconsistencies and omissions negatively impacted on Ms. Pestova's credibility.

[17] The RAD did not err in its credibility findings.

B. *Did the RAD err by failing to consider Ms. Pestova's Roma ethnicity?*

[18] Ms. Pestova argues that the documentary evidence demonstrates that Roma in the Czech Republic are subject to discrimination and that the discrimination rises to the level of

persecution. She argues that the RAD's negative credibility findings are not a basis for failing to consider her profile in light of the documentary evidence. Again, I disagree.

[19] The RAD specifically addressed Ms. Pestova's ethnicity but noted that a finding of a lack of credibility may extend to all evidence emanating from a claimant (*Sheikh v Canada (Minister of Citizenship and Immigration)*, [1990] FCJ No 604 at para 8). The RAD further noted her delay in claiming protection, a delay that it had previously concluded undermined her claim of subjective fear.

[20] The RAD also considered Ms. Pestova's evidence as it related to efforts to obtain state protection. In this regard, the RAD found her testimony to be inconsistent and the "... little, if any, effort to obtain police reports from the Czech Republic" undermined her credibility.

[21] Contrary to Ms. Pestova's submissions, the RAD did address the issue of Roma ethnicity but concluded that there was insufficient credible and trustworthy evidence to conclude that Ms. Pestova had a well-founded fear of persecution under section 96 of the IRPA. Again, this conclusion was reasonably available to the RAD in light of its previous findings that Ms. Pestova had not satisfied her burden in respect of subjective fear and state protection.

C. *Did the RAD err in not conducting an oral hearing?*

[22] In written submissions Ms. Pestova submits that the RAD erred in not conducting an oral hearing on the basis that the RPD hearing was patently unfair. Ms. Pestova does not argue that the RAD misinterpreted section 110 of the *Immigration Refugee and Protection Act*, SC 2001, c

27, [IRPA] but rather argues that the RAD erred because the RPD hearing was patently unfair. There is no merit to this submission.

[23] In addressing the request for an oral hearing the RAD noted that it had admitted one piece of new evidence and that “[a]ccording to Section 110(6) of the IRPA, the RAD may hold a hearing if, in its opinion, there is documentary evidence referred to in 110(3) that raises a serious issue with respect to the credibility of the Appellant, that is central to the RPD’s decision, and that, if accepted, would justify allowing or rejecting the refugee protection claim.”

[24] The RAD considered the new evidence, noting it addressed the treatment of Roma in the Czech Republic and that there was a considerable amount of similar evidence in the record. The RAD concluded that the evidence did not raise a serious issue with respect to credibility and, having not met the threshold criteria, the RAD was not in a position to grant an oral hearing. The request was denied.

[25] The RAD’s treatment of the request was based on a reasonable interpretation of section 110 of the IRPA and consistent with the jurisprudence of this Court (*Biftu Adera v Canada (Citizenship and Immigration)*, 2016 FC 871 at para 57 notably citing *Canada (Citizenship and Immigration) v. Singh*, 2016 FCA 96 at para 71 and *Ajaj v Canada (Citizenship and Immigration)*, 2016 FC 674 at paras 19-21).

[26] The RAD did not err in denying the request for an oral hearing.

IV. Conclusion

[27] The RAD's credibility findings and overall conclusion in considering Ms. Pestova's appeal fall within the range of possible, acceptable outcomes defensible in respect of the facts and law (*Dunsmuir* at para 47).

[28] Neither party has proposed a question for certification, none arises.

JUDGMENT

THIS COURT'S JUDGMENT is that the application is dismissed. No question is certified.

"Patrick Gleeson"

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: IMM-533-16

STYLE OF CAUSE: SANDRA PESTOVA v THE MINISTER OF
CITIZENSHIP AND IMMIGRATION

PLACE OF HEARING: TORONTO, ONTARIO

DATE OF HEARING: SEPTEMBER 1, 2016

JUDGMENT AND REASONS: GLEESON J.

DATED: SEPTEMBER 9, 2016

APPEARANCES:

Dov Maierovitz FOR THE APPLICANT

Rafeena Rashid FOR THE RESPONDENT

SOLICITORS OF RECORD:

William F. Pentney FOR THE RESPONDENT
Deputy Attorney General of
Canada
Toronto, Ontario