

Federal Court



Cour fédérale

Date: 20160810

Docket: IMM-571-16

Citation: 2016 FC 912

Ottawa, Ontario, August 10, 2016

PRESENT: The Honourable Mr. Justice Manson

BETWEEN:

**PHILIPA SHERIKA FERNANDER
THELJA PINDER**

Applicants

and

**THE MINISTER OF CITIZENSHIP AND
IMMIGRATION**

Respondent

JUDGMENT AND REASONS

I. Introduction

[1] The Applicants appeal the decision of the Refugee Appeal Division [RAD] dated January 13, 2016, pursuant to subsection 72(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA], which held pursuant to subsection 111(1)(a) of the IRPA, that the Applicants are neither Convention Refugees nor persons in need of protection.

II. Background

[2] The Applicants are lesbian women from the Bahamas who have been in a same-sex common-law relationship for around three years.

[3] The Applicants fear persecution in the Bahamas on the basis of their sexual orientation. Due to the homophobic environment in the Bahamas, the Applicants tried to hide their sexual orientation and relationship from members of the general public for years, wanting to avoid verbal abuse, discrimination, harassment, and physical assault experienced by other homosexuals in that country whose sexuality was exposed.

[4] Given the homophobic environment in the Bahamas, as well as threats and attacks that the Applicants were facing from Philipa's ex-girlfriend, the Applicants fled to Canada on July 25, 2015, filing a claim for refugee protection with immigration authorities immediately upon arriving.

[5] The Applicants' refugee hearing was held before a member of the Refugee Protection Division [RPD] on September 24, 2015. By decision dated October 16, 2015, the RPD rejected the Applicants' refugee claim.

[6] Following the rejection of their claim, the Applicants filed an appeal to the RAD. In their Appellant's Record, the Applicants provided additional evidence corroborating their sexual

orientation and same-sex common-law relationship, including letters of support which were not provided to them until after the rejection of their claim.

[7] By decision dated January 22, 2016, the RAD refused to admit the corroborating documentary evidence filed in support of the appeal in that the evidence failed to meet the test in subsection 110(4) of the IRPA, rejected the Applicants' appeal, and upheld the RPD decision rejecting the claim. The RAD found that the support letters did not arise after the rejection of the Applicants' refugee claim and they did not establish that the documents were not reasonably available to them prior to their hearing before the RPD.

[8] Moreover, the RAD found that even if the documents met the requirements of subsection 110(4), they would be refused or given no weight for lack of credibility.

[9] Though the Applicants' claim for refugee protection and appeal was rejected by the RPD and RAD respectively, the Applicants' position is that they continue to fear persecution and risk to their lives in the Bahamas because of their sexual orientation and same-sex common-law relationship.

III. Issues

[10] The issues are:

- A. Was the RAD's decision reasonable in refusing to consider alleged new evidence under subsection 110(4) of the IRPA?
- B. Was the RAD reasonable in conducting its section 97 analysis of the Applicants' claim?

IV. Standard of Review

[11] The Federal Court of Appeal has clearly indicated that this Court should review RAD decisions on a standard of reasonableness, including the issue of exclusion of evidence under subsection 110(4) of the IRPA (*Canada (Minister of Citizenship and Immigration) v Huruglica*, 2016 FCA 93 at paras 26-35; *Canada (Minister of Citizenship and Immigration) v Singh*, 2016 FCA 96 at paras 22-30).

[12] The Court should only interfere if the reasons do not evince justification, transparency, and intelligibility and fall beyond the range of acceptable outcomes (*Agraira v Canada (MPSEP)*, 2013 SCC 36 at paras 51-53).

V. Analysis

A. *Was the RAD's decision reasonable in refusing to consider alleged new evidence under subsection 110(4) of the IRPA?*

[13] The Applicants' argue that the RAD unreasonably found that new evidence filed in support of the appeal providing additional corroborative evidence of the Applicants' sexual orientation and relationship did not meet the requirements under subsection 110(4) of the IRPA, warranting intervention in light of centrality of the Applicants' sexual orientation to the claim.

[14] The Applicants further argue that the RAD erred by conflating the question of when the support letters were received with the question of when they were requested. The Applicants' uncontradicted evidence was that the letters were received after the RPD hearing, in late

November, 2015. The RAD did not doubt this evidence. Yet the RAD refused to accept the evidence, based on its incorrect assumption that the letters were not sought until after the hearing. The RAD stated:

[39] With the greatest of respect to the Appellants, the fact that they did not seek these letters until after the rejection of their refugee claim does not mean the letters were unavailable.

[15] However, the RAD found, at paragraphs 64 and 65 of their decision:

[64] Section 3(3)(g) of the RAD Rules requires the Appellants to make full and detailed submissions regarding the errors that are the rounds of the appeal, and where those errors are located.

[65] Here the Appellants have not challenged the RPD's many credibility findings; they simply argue that those findings do not apply to their sexual orientation. While the RAD will address that argument below, it notes here that the RPD's credibility findings were determinative of the Appellant's refugee claims. The Appellants have not pointed out any errors in the findings that were made, and there is no basis for the RAD's appellate intervention with respect to those findings.

[16] The Applicants have failed to address, let alone challenge, the RPD's negative credibility findings, or the RAD's confirmation of those findings, and in doing so failed to deal with the determinative issue.

[17] The RAD reasonably found that the Applicants "did not seek these letters, until after the rejection of their refugee claims". While the timing of the generation of the letters is certainly ambiguous, the RAD reasonably concluded that the Applicants failed to establish that these materials were not reasonably available to them prior to October 16, 2015, and therefore failed to satisfy the test under subsection 110(4) of the IRPA.

[18] Moreover, the Applicants provided no reasonable basis as to why their past misrepresentations – specifically, manipulation of documentary evidence – should not colour their subsequent attempts to submit such evidence: a refugee claimant’s negative credibility can extend to all of their evidence, including documents, and can extend to requests to their acquaintances to corroborate allegations already found to be not credible (*Moriom v Canada (Minister of Citizenship and Immigration)*, 2015 FC 588 at paras 24-27).

B. *Was the RAD reasonable in conducting its section 97 analysis of the Applicants’ claim?*

[19] The Applicants argue that in concluding that the RPD’s general credibility findings implicitly incorporated a rejection of the Applicants’ sexual orientation and their same-sex common-law relationship, the RAD reached a unreasonable determination, given that at no point in the decision does the RPD articulate a rejection of either the Applicants’ self-identification as lesbians, nor the conjugal nature of their same-sex relationship with one another.

[20] Moreover, the Applicants state that there was objective country documentation and other evidence on the record which could have supported a determination that the Applicants as lesbian women in a same-sex relationship were protected persons as contemplated under subsection 97(1) of the IRPA. Despite this, neither the RPD nor the RAD conducted a separate subsection 97(1) analysis of this evidence, appearing to assume that the findings under section 96 were automatically applicable to those under subsection 97(1).

[21] However, the RPD set out the Applicants' allegations and found as follows in paragraphs 3, 36 and 41 of its decision:

[3] The Claimants allege that they are a lesbian couple. The alleged that if they return to the Bahamas and express their sexual orientation they will face persecution. The Claimants traveled to Canada together on July 25, 2016, and made refugee claims upon arrival in Toronto airport.

[36] After carefully assessing the evidence and counsel's submissions, the Panel finds on a balance of probabilities that the Claimants are not credible. This is a global finding: in the Panel's view the Claimants are simply not credible witnesses and the Panel does not believe them. The negative inferences drawn, particularly in respect of their provision of fraudulent letters, lead the Panel to conclude that the Claimant's allegations are false...

[41] For the foregoing reasons, the Panel finds that the Claimants have not established their allegations on a balance of probabilities with credible or trustworthy evidence.

Emphasis added

[22] Accordingly, the Applicants failed to establish that they are a lesbian couple on a balance of probabilities, a necessary precondition to assessing the merits of their claim pursuant to both section 96 and 97 of the IRPA. At paragraph 72 of the decision, the RAD held that:

[72] While it is true that the RPD did not make a specific finding with respect to the Appellants' sexual orientation, the RAD concludes that the RPD's global credibility finding must be understood as addressing this matter. The issue of sexual orientation was at the very core of the Appellants' refugee claim; the RPD made clear that it did not believe any part of that claim. It did make a positive finding of national identity, based on the Appellants' original passports; it then disbelieved the remainder of the Appellants' refugee claims. In the RAD's view, this can only be understood to mean that the RPD did not accept the Appellants' claim to be lesbian and in a lesbian relationship.

[23] The RAD's decision is reasonable.

JUDGMENT

THIS COURT'S JUDGMENT is that:

1. The Application is dismissed;
2. There is no question for certification.

"Michael D. Manson"

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: IMM-571-16

STYLE OF CAUSE: PHILIPA SHERIKA FERNANDER ET AL v THE
MINISTER OF CITIZENSHIP AND IMMIGRATION

PLACE OF HEARING: TORONTO, ONTARIO

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