Federal Court  Cour fédérale

Date: 20170726

Docket: IMM-1172-16

Citation: 2017 FC 729

St. John's, Newfoundland and Labrador, July 26, 2017

PRESENT: The Honourable Madam Justice Heneghan

BETWEEN:

KIANA YUNOKA KA SIMMONS

Applicant

and

MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

[1] Ms. Kiana Yunoka Ka Simmons (the "Applicant") seeks judicial review of the decision of the Immigration and Refugee Board, Refugee Protection Division (the "RPD"). In that decision, dated March 9, 2016, the RPD denied her application, pursuant to Rule 62 of the *Refugee Protection Division Rules*, SOR/2012-256 (the "RPD Rules"), to reopen her claim for recognition as a Convention refugee or person in need of protection, pursuant to section 96 and

subsection 97(1), respectively, of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 (the "Act").

[2] The Applicant's claim for protection was dismissed by a decision issued on August 11, 2015.

[3] The Applicant sought leave and judicial review of that decision in cause number IMM-3979-15. The application for leave was dismissed by Order made on May 16, 2016 but upon a motion by the Applicant for reconsideration, the Application for was granted by Order made on July 22, 2016. That Order specifically provided that the Applicant had leave to file a Notice of Discontinuance in cause number IMM-3979-15, in order to avoid the application of section 170.2 of the Act. A notice of discontinuance was filed on July 25, 2016.

[4] The Applicant is a citizen of St. Vincent and the Grenadines. Her claim for protection was based upon her status as a lesbian.

[5] The Applicant entered Canada in 2011 to visit her mother. In 2015, she sought protection. In dismissing her claim, the RPD found that the Applicant had not established that she faced a serious possibility of persecution on a Convention ground. It also made negative credibility findings and a "no credible basis" finding. Further, the RPD commented on the Applicant's delay in seeking protection.

[6] In seeking to reopen her claim, the Applicant pleaded that breaches of natural justice occurred at her hearing before the Board. She complained that requests by the adjudicator that she clarify her answers or repeat her evidence gave rise to a breach of procedural fairness.

[7] In deciding the reopening application, the RPD determined that no breach of natural justice had occurred. It found that the Applicant was seeking to have her evidence reweighed, in the guise of asking to reopen her claim on the basis of alleged breaches of procedural fairness.

[8] In seeking judicial review of the denial of her application to reopen, the Applicant argues that the RPD erred by ignoring and failing to discuss nearly all of the grounds she raised in her application to reopen her claim. She submits that the failure of the RPD to take into account her psychological vulnerabilities at the time of her refugee protection hearing was a reviewable error. She pleads that her psychological condition at that time deprived her of the right and opportunity to meaningfully participate in the hearing of her claim for protection.

[9] The Minister of Citizenship and Immigration (the "Respondent") argues that the Applicant, in the within application for judicial review, is improperly focusing on the decision of the RPD in the reconsideration application rather than upon alleged breach of procedural fairness in the proceedings before the first panel, in adjudicating her claim for protection.

[10] The Respondent submits that the applicable standard of review is correctness and that the reviewing Court is to review the proceedings before the initial panel, on a *de novo* basis, to determine if a breach of natural justice occurred in the hearing before the RPD.

[11] The first issue to be addressed is the standard of review. According to the decision in *Mission Institute v. Khela*, [2014] 1 S.C.R. 502 at paragraph 79, an issue of procedural fairness is reviewable on the standard of correctness.

[12] I agree with the Respondent that the applicable standard of review in this case is correctness. The Applicant is seeking judicial review of a decision of the RPD refusing to reopen her claim for protection. She made her request to reopen pursuant to Rule 62(1) of the RPD Rules that provides as follows:

> At any time before the Refugee Appeal Division or the Federal Court has made a final determination in respect of a claim for refugee protection that has been decided or declared abandoned, the claimant or the Minister may make an application to the Division to reopen the claim.

[13] I agree too with the submissions of the Respondent that the Court should be looking at the process followed by the first panel of the RPD that heard the Applicant's claim for protection.

[14] The Applicant filed her claim for protection on June 12, 2015. According to her Basis of Claim, she alleged that she was at risk in her country of nationality on the basis of sexual orientation and gender.

[15] The Applicant was represented by Counsel when she appeared before the RPD on June 28, 2015. She was the sole witness. According to the transcript of her evidence contained in the Certified Tribunal Record, she was first examined by the panel member and then by her lawyer.

[16] In asking to have her claim reopened, the Applicant raised several grounds. She alleged that she was denied natural justice in the hearing before the RPD because the member asked her to repeat her evidence, did not provide accommodation for her mental health issues, and failed to address the gender ground of her claim. She also claimed that the fact that the RPD was presided over by a man and that she was represented by a male lawyer resulted in a breach of natural justice. She argued that the RPD failed to address her claim that she fears persecution on the basis of gender if returned to St. Vincent and the Grenadines.

[17] The transcript shows a number of occasions where the RPD asked the Applicant to speak up.

[18] I am not persuaded that these instances amount to a denial of procedural fairness.

[19] The Applicant carried the burden of presenting her claim to the RPD.

[20] The essence of the duty of natural justice is that a person has the opportunity to present his or her case; see the decision in *New Brunswick v. Dunsmuir*, [2008] 1 S.C.R. 190 (S.C.C.) at paragraph 77.

[21] I see no interference with the Applicant in presenting her evidence. She was assisted by Counsel.

[22] The Applicant's current arguments that the RPD ignored the psychological report are not persuasive.

[23] In the first place, there is a presumption that the decision-maker considered all relevant evidence; see the decision in *Ferraro v. Canada (Minister of Citizenship and Immigration)*, 2011 FC 801 at paragraph 17. In any event, a medical report, by itself, can rarely establish a claim for protection.

[24] The RPD was mandated to assess the Applicant's evidence, in support of her claim of being at risk. In the opinion of the Member, the Applicant did not meet her burden and a finding of "no credible basis" was made.

[25] I note the reliance of the Respondent upon the decision of the Federal Court of Appeal in *Hillary v. Canada (Minister of Citizenship and Immigration)* (2011), 331 D.L.R. (4th) 338 (F.C.A). In that case, Mr. Hilary sought to reopen a decision before the Immigration Appeal Division on the basis of an alleged breach of procedural fairness. At paragraph 29, Mr. Justice Evans, writing for the Federal Court of Appeal, said the following:

> In the absence of independent fact-finding by either the IAD or the Judge, this Court must answer the certified question by deciding for itself whether the IAD panel that dismissed Mr Hillary's appeal breached a principle of natural justice by failing to inquire into his understanding of the nature of the appeal proceedings.

[26] I am bound by the decision of the Federal Court of Appeal; see the decision in *Allergan Inc. et al. v. Canada (Minister of Health) et al.* (2012), 440 N.R. 269 (F.C.A.) where that Court

said at paragraph 43 that "*Stare decisis* requires judges to follow binding legal precedents from higher courts."

[27] I agree with the submissions of the Respondent about the relevance of the *Hillary, supra,* decision to the within application.

[28] The Applicant here was represented by Counsel. There is no evidence that she did not freely choose her lawyer.

[29] The Applicant gave evidence. She did not call witnesses to support her evidence. That was her choice.

[30] The Applicant suggests that she was prejudiced by the fact that her claim was heard by a man.

[31] The Applicant argues that the RPD failed to consider many of the specific grounds that she raised in her reopening request.

[32] These arguments are not persuasive. According to the relevant jurisprudence, this Court is required to review the original proceeding before the RPD and decide if either the hearing or the decision was flawed by a breach of procedural fairness.

[33] I am not satisfied that the RPD failed to accommodate the Applicant during the hearings.

[34] I agree with the Respondent, that the Applicant is attempting to now argue that the RPD's failure to address a ground of risk is not properly before the Court in an application pursuant to Rule 62. That argument raises a substantive issue that belongs in an application for judicial review.

[35] The Applicant was responsible for raising any ground of risk upon which she relied.

[36] I also agree with the Respondent's Arguments that the Applicant is trying to challenge the negative credibility findings as part of an alleged breach of procedural fairness.

[37] As noted above, the RPD is authorized to assess credibility. It is not the role of the Court. I reject the Applicant's argument on this issue.

[38] In the result, I am not satisfied that the Applicant has shown any reviewable error by the RPD in refusing her application to reopen her claim for protection. This application for judicial review will be dismissed.

[39] The Applicant proposed the following question for certification:

> On a judicial review of a decision of the Refugee Protection Division not to re-open a claim for refugee protection, is it a reviewable error for the Member not to address an alleged denial of natural justice raised by the Applicant in the re-opening application or is such an error immaterial in light of the Federal Court of Appeal's comments on the standard of review in *Hillary v. Canada (MCI),* 2011 FCA 51 at paras. 27-30?

[40] The test for certifying a question pursuant to subsection 74(d) of the Act is set out in *Zazai v. Canada (Minister of Citizenship and Immigration)* (2004), 318 N.R. 365 (F.C.A.), that is a serious question of general importance that would be dispositive of an appeal.

[41] In my opinion, the proposed question has been answered by the decision of the Federal Court of Appeal in *Hillary, supra*. The proposed question will not be certified.

JUDGMENT FOR IMM-1172-16

THIS COURT'S JUDGMENT is that the application for judicial review is dismissed, no question for certification arising.

"E. Heneghan"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-1172-16
STYLE OF CAUSE:	KIANA YUNOKA KA SIMMONS v. MCI
PLACE OF HEARING:	TORONTO, ONTARIO
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