Federal Court  Cour fédérale

Date: 20090605

Docket: IMM-5049-08

Citation: 2009 FC 590

Ottawa, Ontario, June 5, 2009

PRESENT: The Honourable Max M. Teitelbaum

BETWEEN:

Roza MELIKYAN

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application under subsection 72(1) of the *Immigration and Refugee Protection Act*, R.S. 2001, c. 27 (IRPA), for judicial review of a decision made on September 22, 2008 by the Refugee Protection Division of the Immigration and Refugee Board (the panel) rejecting the applicant's claim for refugee protection.

[2] What should be determined in this case is whether the panel breached its duty of procedural fairness by failing to provide adequate reasons for its decision.

[3] The applicant, Roza Melikyan, is a 70-year-old citizen of Armenia. She alleges that she lost ownership of her apartment because of fraudulent schemes involving a local police officer in particular.

[4] The applicant owns an apartment in the city of Erevan (or Yerevan) in Armenia. She lived her entire life in the same apartment and never moved. She never agreed to sell her apartment, since she intended to live there for the rest of her life.

[5] In April 2006, a police officer named Mr. Sarkisyan came to visit the applicant and told her that a young man named Raffy Melitosyan was prepared to pay her $1,000 for a “propiska” for her apartment, that is, the registration of a right to reside there. The applicant immediately refused.

[6] The following week, the police officer came back to the applicant’s apartment. He asked for her passport and asked her to sign two documents for strictly administrative reasons. Suspecting nothing, the applicant agreed to sign the documents.

[7] On May 3, 2006, Mr. Sarkisyan returned the applicant’s passport to her and paid her the $1,000 previously offered, assuming that she had agreed to recognize the propiska. The applicant refused to take the money, so the police officer told her to forget the conversation and took the money back.

[8] Two weeks later, a woman came to the applicant’s apartment to thank her for agreeing to recognize the propiska for her nephew. The applicant denied that she had done so, and the woman then asked her why she had accepted $3,000 in exchange.

[9] The applicant went to see Mr. Sarkisyan to ask for information, but he threw her out, saying that he had no idea what she was talking about and that she should go to see a psychiatrist. The next day, she received confirmation that she had in fact agreed to the transaction. She therefore consulted a lawyer, who told her that a judge would likely conclude that she had agreed to the transaction because she had voluntarily signed the document for the propiska.

[10] The applicant went back to see the police officer to tell him that she would fight this injustice as long as she lived. He replied that that would not be very long. The applicant subsequently began to receive threatening telephone calls and experienced forms of physical aggression.

[11] The applicant requested an invitation from her son, who is a Canadian citizen, and obtained a visitor visa. She arrived in Canada on October 7, 2006 and claimed refugee protection on October 12, 2006.

[12] The panel heard the applicant's testimony and analysed all the evidence. On the merits of the case, it noted that the applicant's entire story in support of her claim for refugee protection was based on the fact that she owned an apartment in Armenia. However, it noted that she had provided no documents to support this, nor had she taken any steps to obtain such documents.

[13] The panel did not agree with the arguments made by counsel for the applicant to the effect that the applicant would not have been able to obtain the documents anyway. First, those were not

the reasons the applicant gave in her testimony to explain why she did not have them. Second, that explanation could be justified only if she had already attempted unsuccessfully to obtain them.

[14] The panel therefore rejected the claim for refugee protection because the applicant had not established the essential element of her story, namely that she owned an apartment in her country of origin.

[15] The applicant submits that procedural fairness required the panel to provide adequate reasons for its decision and that the standard of correctness applies in determining whether it did so (*C.U.P.E. v. Ontario (Minister of Labour)*, 2003 SCC 29, [2003] 1 S.C.R. 539; *Canada (M.C.I.) v. Charles*, 2007 FC 1146, 161 A.C.W.S. (3d) 779).

[16] I agree that the standard of review applicable to questions of procedural fairness is correctness (*Sketchley v. Canada (Attorney General)*, 2005 FCA 404, [2006] 3 F.C.R. 392).

[17] The panel's decision is based on a question of physical evidence that was not submitted, and the panel did not make a finding of non-credibility. The applicant argues that, in such a case, the panel must accept the allegations it has summarized as true (*Addo v. Canada (M.E.I.)* (1992), 142 N.R. 170, 33 A.C.W.S. (3d) 1117), and this Court's decisions do not require her to put forward such evidence when no question of credibility is raised. In *Waheed v. Canada (M.C.I.)*, 2003 FCT 329, 121 A.C.W.S. (3d) 929, this Court noted that, in the absence of evidence contrary to what has been said in testimony, it is not open to the panel to draw negative inferences and disbelieve the testimony.

[18] If the panel cannot draw negative inferences, it cannot reject the claim on such a basis. It is clear in this case that the panel requested corroborative evidence, but the applicant submits that such evidence was not required because her credibility was not at issue. She explained that the document was hidden in a drawer in a wall of her apartment. She submits that the panel had to consider the plausibility of the reasons she gave on this point.

[19] The panel did not rule on the explanations given by the applicant but addressed the arguments made by her counsel, so its analysis was incomplete.

[20] In addition to the explanations given during the testimony and the arguments made by the applicant and her counsel, the panel should have considered what was written on the applicant's personal information form (PIF), namely that she had decided to leave Armenia but had not known how to claim refugee protection in Canada. She therefore asked her son, who is a Canadian citizen, to send her an invitation, and she then sent her documents to her other son in Russia, who applied for a visitor visa in her name at the Canadian embassy. According to the applicant, the documents showing the property she owned and her attachment to Armenia were sent to the Canadian embassy in Russia, which did not provide her with a copy.

[21] In *Kifoueti v. Canada (M.C.I.)* (1999), 164 F.T.R. 116, 89 A.C.W.S. (3d) 124, a case dealing with a change in circumstances, the Court held that the applicant could not be required to provide evidence she was not in a position to provide, since this infringed the fairness principle.

[22] The respondent believes that the applicant is at fault for not trying to contact the individual living in the apartment to obtain the title document. The respondent is therefore asking the applicant

to contact the thief who took possession of her property to ask him to return the title document to her. In the applicant's view, this position is completely unreasonable. Moreover, since there was no finding of non-credibility, unlike in *Muthiyansa v. Canada (M.C.I.)*, 2001 FCT 17, 103 A.C.W.S. (3d) 809, the panel could not request such a document in the circumstances of this case.

[23] The applicant submits that the panel's reasons do not make it possible to understand the basis for its decision or the reasoning behind its conclusions. It is impossible to determine whether a decision is reasonable when the grounds on which the decision is based are not sufficiently clear and detailed. It is not enough to recite the law. Reference must be made to the relevant evidence. As explained by the Court in *Via Rail Canada Inc. v. National Transportation Agency*, [2001] 2 F.C. 25, 261 N.R. 184, the duty to give reasons for a decision is fulfilled only if the reasons provided are adequate.

[24] Moreover, the merits of the applicant's claim turn not on the question of the apartment but rather on the fact that she was defrauded by the local police officer and threatened. Yet the panel did not rule on those threats or the risk she might incur if she were removed, which, in the applicant's submission, is a reviewable error. Since the panel did not find that she or her story lacked credibility, it at least had to rule on her fear and the risks and threats she might have to face if she returned to her country. In short, the panel failed to consider and rule on the essential elements of section 97 of the IRPA, as it was required to do (*Canada (Attorney General) v. Ward*, [1993] 2 S.C.R. 689, 153 N.R. 321).

[25] The respondent notes that refugee claimants are responsible for submitting evidence in support of their story, since the burden of proof is on them (*Hng v. Canada (M.C.I.)*, 2005 FC 231,

148 A.C.W.S. (3d) 300, at paragraph 20). Here, the applicant was targeted as the owner of an apartment in Armenia. Obviously, if she does not own that dwelling, her other allegations are unfounded. Yet she filed no document showing that she owns an apartment in Armenia. The respondent also points out that the applicant made no attempt to obtain any document to establish her title, and this failure to act is what justified rejecting her claim for refugee protection.

[26] The respondent initially interpreted the applicant's testimony as meaning that her title document was in a special drawer in an apartment in the city of Kirova. At the time, the respondent brought up the possibility that the occupant of that apartment (a person other than the defrauder living in the apartment in Erevan) could access the document. However, the respondent admits that he was mistaken, since the extract he read in Mr. Benchamcham's affidavit is not consistent with the transcript found in the record put together for the Court, from which it is clear that no one referred to Kirova during the hearing.

[27] However, based on the transcript, the respondent concludes that the panel always understood that the document was hidden in the apartment in Erevan. Thus, the respondent's analysis based on the incorrect analysis has no impact on the reasonableness of the panel's conclusions.

[28] The respondent submits that the document, though hidden, was accessible if the applicant had seen fit to request it from the occupant of the apartment, but she took no steps to obtain a copy of the document. As well, there is no indication that she tried to contact the individual living in the apartment.

[29] The respondent further notes that the Armenian authorities were not approached to obtain a copy of the applicant's title document. At the hearing, the applicant testified that she did not know whether it was possible to request a copy.

[30] The respondent also notes that there is no indication that the applicant's title document was filed with the Canadian authorities at the embassy in Russia or that the documents in question were filed with the panel. The respondent notes that, if the documents were filed to obtain a visitor visa, the applicant could easily have filed the same documents with the panel. The respondent is therefore of the opinion that the applicant's failure to take steps to provide that evidence justified rejecting her claim for refugee protection. The panel rejected the claim because of the applicant's failure to prove the central element of her problems, namely ownership of the apartment in Armenia. The evidence shows that this failure occurred because the applicant had made no effort to obtain the document required to prove the element that triggered all of her alleged problems.

[31] This Court has found that failure to make any effort to obtain the key element of a claim for refugee protection may be considered in assessing the credibility of a story. In *Muthiyansa*, above, at paragraph 13, the Court noted that the source of the panel's concern was not the lack of documents corroborating the applicant's testimony but rather the fact that the applicant was unable to satisfy the panel as to why, after 10 months in Canada, she had not made efforts to obtain the relevant documentation.

[32] Likewise, in *Quichindo v. Canada (M.C.I.)*, 2002 FCT 350, 115 A.C.W.S. (3d) 680, the Court stated that a refugee claimant's failure to seek evidence in support of the claimant's statements may be considered in assessing credibility. In *Encinas v. Canada (M.C.I.)*, 2006 FC 61,

152 A.C.W.S. (3d) 497, at paragraphs 16 and 21, the Court was confronted with an argument similar to the applicant's in this case, namely that the panel had not cited any specific evidence sullying the refugee claimant's credibility. The Court noted that there was no basis for this argument, since the panel had explained why the story was not credible (see also *Sinnathamby v. Canada (M.C.I.)*, 2001 FCT 473, 105 A.C.W.S. (3d) 497; *Hassane v. Canada (M.C.I.)*, 2008 FC 215, [2008] F.C.J. No. 265 (QL); *Alonso v. Canada (M.C.I.)*, 2008 FC 683, 170 A.C.W.S. (3d) 162).

[33] With regard to the applicant's allegation that the panel's reasons for rejecting the claim are inadequate, in *Ogunfowora v. Canada (M.C.I.)*, 2007 FC 471, 157 A.C.W.S. (3d) 628, at paragraph 58, the Court reiterated, *inter alia*, the principles stated by the Federal Court of Appeal in *Mehterian v. Canada (M.E.I.)*, [1992] F.C.J. No. 545 (QL), and *Hussain v. Canada (M.E.I.)* (1994), 174 N.R. 76, 49 A.C.W.S. (3d) 337, at paragraph 3. The panel's reasons must be sufficiently clear, precise and intelligible so that the person concerned can decide whether it would be appropriate to file an application for judicial review. The Court also stated that the reasons must provide a clear basis for the decision maker's reasoning and that the decision maker must clearly express itself on primary issues arising from a claim for refugee protection. However, there is no requirement that the panel's reasons address all the arguments made or that the panel limit itself to the points suggested by the claimant (*Mutumba v. Canada (M.C.I.)*, 2009 FC 19, [2009] F.C.J. No. 5 (QL), at paragraph 27).

[34] The hearing transcript shows that the question of the impact of the propiska and the possibility of finding protection in a city other than Erevan, such as Vanadzor, the country's third most populous city, were discussed at the hearing. However, the panel concluded in a clear,

precise and intelligible manner that the applicant's entire story in support of her claim was based on ownership of an apartment in Armenia but that she had provided no documents to prove this, nor had she taken any steps to obtain such documents. The panel rejected the explanations given by counsel for the applicant to the effect that such steps would have been pointless, since this was not the reason the applicant gave in her testimony and since she would have had to take such steps before they could be declared unsuccessful. Since she had not made any attempt, her explanation that it was difficult to enlist the cooperation of foreign authorities in obtaining a copy was unfounded. In the end, the panel concluded that the applicant had not established the essential element of her story, namely ownership of an apartment in Armenia. The claim for refugee protection was therefore unfounded.

[35] The panel is entitled to consider failure to take steps in assessing the credibility of a case (*Muthiyansa*, above, at paragraph 13). Here, the applicant arrived in Canada on October 7, 2006, and her claim was heard 19 months later on May 27, 2008. The respondent submits that she could have taken steps during that period of a year and a half.

[36] The standard to be applied in determining whether adequate reasons have been given for a decision was stated in *Mendoza v. Canada (M.C.I.)*, 2004 FC 687, 131 A.C.W.S. (3d) 323, at paragraph 4, where the Court relied on the decision of the Federal Court of Appeal in *Mehterian v. Canada (M.E.I.)*, [1992] F.C.J. No. 545 (QL). The Court stated that reasons are required to be sufficiently clear, precise and intelligible so that a claimant may know why his or her claim has failed and be able to decide whether to seek leave for judicial review. As well, if the reasons stated by the panel fail to provide a clear basis for the reasoning behind its decision, the decision will be set aside (*Hussain v. Canada (M.E.I.)* (1994), 174 N.R. 76, 131 A.C.W.S. (3d) 323, at paragraph 3

(F.C.A.)). The panel must clearly express itself on primary issues arising from a claim for refugee protection, and failure to do so will result in its decision being set aside (*Chen v. Canada (M.C.I.)*, 2001 FCT 500, 105 A.C.W.S. (3d) 1126). As explained in *Via Rail*, above, at paragraphs 21-22:

> The duty to give reasons is only fulfilled if the reasons provided are adequate. What constitutes adequate reasons is a matter to be determined in light of the particular circumstances of each case. However, as a general rule, adequate reasons are those that serve the functions for which the duty to provide them was imposed.
>
> . . .
>
> The obligation to provide adequate reasons is not satisfied by merely reciting the submissions and evidence of the parties and stating a conclusion. Rather, the decision maker must set out its findings of fact and the principal evidence upon which those findings were based. [citations omitted]

[37] In this case, the panel had jurisdiction to draw inferences and assess the applicant's credibility (*Aguebor v. Canada (M.E.I.)* (1993), 160 N.R. 315, 42 A.C.W.S. (3d) 886; see also *Maple Lodge Farms*, [1982] 2 S.C.R. 2, 44 N.R. 354, at pages 7-8). Moreover, absent evidence to the contrary, the panel is presumed to have considered all the evidence before it (*Florea v. Canada (M.E.I.)*, [1993] F.C.J. No. 598 (QL)).

[38] In its decision, the panel did not merely recite the submissions and evidence of the parties and then state a conclusion. The panel's conclusion was based on logic and common sense, that is, the fact that the applicant had to prove the characteristic on which her claim for refugee protection was based, namely her ownership of an apartment in Erevan, Armenia.

[39] The standard of review applicable to the panel's decision requires a high degree of judicial deference. Although no negative finding was made on the applicant's credibility, little evidence and documentation were entered in the record, and the panel gave adequate reasons for its conclusion.

[40] For these reasons, I find that the panel did not breach its procedural duty, and the application for judicial review is dismissed.

[41] The applicant's representative submitted the following questions for certification:

> [TRANSLATION]
>
> Question 1 – Where the RPD does not make a finding of non-credibility, can the panel reject a claim solely because the claimant failed to provide a document to corroborate a fact that the panel considers to be the basis for the claimant's story?
>
> If so, does the panel have a duty to comment on the reasons why the claimant could not reasonably have obtained the document and to take those reasons into account even if the claimant did not try to obtain the document?
>
> Question 2 – Without statutory authorization, can the panel import the specifications in section 106 of the IRPA, which deals with foreign nationals who have no documentation establishing their identity, and implicitly extend them to any element considered essential to a claim?

[42] I am in complete agreement with the respondent's submissions concerning the questions proposed by the applicant. I am not satisfied that they are serious questions of general importance. Accordingly, they will not be certified.

JUDGMENT

THIS COURT ORDERS AND ADJUDGES that the application for judicial review be dismissed.

"Max M. Teitelbaum"
Deputy Judge

Certified true translation
Brian McCordick, Translator

FEDERAL COURT

SOLICITORS OF RECORD

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