Federal Court  Cour fédérale

Date: 20151005

Docket: IMM-3894-14

Citation: 2015 FC 1137

Ottawa, Ontario, October 5, 2015

PRESENT: The Honourable Mr. Justice LeBlanc

BETWEEN:

OKSANA SHUMSKA

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

ORDER AND REASONS

I. Introduction

[1] The Applicant seeks judicial review pursuant to subsection 72(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [the Act] of a decision of the Refugee Appeal Division of the Immigration and Refugee Board [the RAD], dated April 16, 2014, wherein the RAD confirmed the decision of the Refugee Protection Division [the RPD] that the Applicant is

neither a Convention refugee within the meaning of section 96 of the Act nor a person in need of protection as defined in section 97 of the Act.

II. Background

[1] The Applicant is a citizen of Ukraine. She arrived in Canada in September 2008 with a Canadian visitor's visa and applied for refugee status on July 2, 2013 based on a fear of her ex-husband, Volodymyr Shumskyi (Vlad), if she were to return to Ukraine. The Applicant claims she married Vlad in August 2007 and moved in with him shortly thereafter with her daughter from a previous marriage. On September 3, 2007, the Applicant alleges that she and her daughter were assaulted by Vlad. Immediately following the assault, she states that she complained to the police, who refused to provide assistance. The next day, she moved out of Vlad's house with her daughter. The Applicant claims that Vlad continued to harass and threaten her until she left Ukraine in September 2008. She further claims that on November 3, 2008, Vlad assaulted her father, who then warned her not to return to Ukraine.

[2] The RPD found the Applicant's story not to be credible on the basis of several inconsistencies, omissions and contradictions in her evidence. In particular, the RPD noted that the Applicant's evidence at the hearing as to when she had moved in with Vlad was inconsistent and contradicted the dates and addresses provided in her Basis of Claim Form [BOC] and Port of Entry notes. It also noted that the Applicant reported at the hearing that Vlad physically assaulted her a few days after moving out of his house while this attack was not mentioned in her BOC. Finally, the RPD drew a negative inference from the fact the Applicant waited nearly five years following her arrival to Canada before making her refugee protection claim and gave little

weight to her evidence that her mental health and gender profile explained the delay in making her claim.

[3] Before the RAD, the Applicant argued that in making adverse credibility findings with respect to her addresses and the delay in making her refugee protection claim, the RPD engaged in an overzealous microscopic analysis of the evidence, made unjustified plausibility findings and failed to properly apply the Gender Guidelines. The RAD dismissed her appeal.

III. Issue

[4] The main issue in this case is whether the RAD reviewed the RPD's decision against a standard consistent with the role Parliament intended it to play.

[5] I find it did not.

IV. Analysis

[6] Relying on *Dunsmuir v New Brunswick*, 2008 SCC 9, [2008] 1 SCR 190, and the Alberta Court of Appeal's decision in *Newton v Criminal Trial Lawyers' Assn*, 2010 ABCA 399, 493 AR 89, the RAD characterized its appeal function as follows:

> [22] For these reasons, the RAD concludes that, in considering this appeal, it must show deference to the factual and credibility findings of the RPD. The notion of deference to administrative tribunals decision-making requires a respectful attention to the reasons offered or which could be offered in support of the decision made. Even if the reasons given do not seem wholly

> adequate to support the decision, the RAD must first seek to supplement them before it substitutes its own decision.
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> [23] The appropriate standard of review in this appeal is one of reasonableness. Reasonableness is concerned mostly with the existence of justification, transparency, and intelligibility within the RPD's decision-making process, but also with whether the decision falls within the range of possible, acceptable outcomes which are defensible in respect of the facts and the law.

[7] The issue of the role of the RAD – a fairly new issue given that the RAD has become legally operational in December 2012 – has generated several Judgments of this Court in the last year. The Court has consistently held that the RAD commits an error when it applies the reasonableness standard to its review of the RPD's decisions. In *Pataraia v Canada (Citizenship and Immigration)*, 2015 FC 465, Justice Simon Fothergill offered this summary of the Court's jurisprudence on this issue:

> [10] This Court has ruled repeatedly that the RAD commits an error when it applies the standard of reasonableness to its review of the RPD's factual findings (*Djossou v Canada (Citizenship and Immigration)*, 2014 FC 1080 [*Djossou*] at paras 6 and 7). Nevertheless, the RAD owes deference to an assessment of credibility by the RPD that is based on witness testimony (*R v NS*, 2012 SCC 72 at para 25).
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> [11] Most judges of this Court have held that, because the RAD is a specialized tribunal which conducts a "full fact-based appeal", it owes deference to the RPD only when a witness' credibility is critical or determinative or when the RPD enjoys a particular advantage (*Huruglica v Canada (Citizenship and Immigration)*, 2014 FC 799 [*Huruglica*] at paras 54-55; *Yetna v Canada (Citizenship and Immigration)*, 2014 FC 858 at para 17; *Akuffo v Canada (Citizenship and Immigration)*, 2014 FC 1063 [*Akuffo*] at para 39; *Bahta v Canada (Citizenship and Immigration)*, 2014 FC 1245 [*Bahta*] at para 16; *Sow v Canada (Citizenship and Immigration)*, 2015 FC 295 at para 13; see *contra Spasoja v Canada (Citizenship and Immigration)*, 2014 FC 913 at para 40 [*Spasoja*]).

> [12] Although not unanimous on this point (see *Spasoja* at para 39), most judges of this Court have concluded that the RAD must conduct its own independent assessment of the evidence (*Iyamuremye v Canada (Citizenship and Immigration)*, 2014 FC 494 at para 41; *Huruglica* at para 47; *Njeukam v Canada (Citizenship and Immigration)*, 2014 FC 859 [*Njeukam*] at para 15; *Akuffo* at para 45; *Djossou* at para 53). The RAD's obligation to conduct an independent assessment of the evidence extends to questions of credibility.
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> [13] Some decisions of this Court have held that the RAD does not commit a reviewable error when it applies the standard of reasonableness to findings of pure credibility (*Njeukam*; *Akuffo*, *Allalou v Canada (Citizenship and Immigration)*, 2014 FC 1084; *Yin v Canada (Citizenship and Immigration)*, 2014 FC 1209 [*Yin*]). However, as explained by Justice Simon Noël in *Khachatourian v Canada (Citizenship and Immigration)*, 2015 FC 182 at para 32, this Court will uphold the RAD's application of the reasonableness standard to the RPD's findings of credibility only when it is clear that the RAD has in fact conducted its own assessment of the evidence.
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> [14] This is also the thrust of Justice Shore's decision in *Youkap v Canada (Citizenship and Immigration)*, 2015 FC 249 at paras 36 and 37, where he notes that in cases involving findings of pure credibility, the point is not which standard was applied but rather "whether the RAD conducted an independent assessment of the evidence as a whole." Justice Shore has also observed that "the idea that the RAD may substitute an impugned decision by a determination that should have been rendered without first assessing the evidence is inconsistent with the purpose of the IRPA" (*Triastcin v Canada (Citizenship and Immigration)*, 2014 FC 975 at para 25 [*Triastcin*]).

[8] In *Aloulou v Canada (Citizenship and Immigration)*, 2014 FC 1236, I sided with those of my colleagues who are of the view that an appeal before the RAD is intended to be a "full fact-based appeal," not just another form of judicial review, and involves, as a result, a complete review of the questions of fact, law, and mixed law and fact raised in the appeal. In other words, I am of the view that the RAD must conduct an independent assessment of the evidence and that this assessment extends to questions of credibility.

[9] Here, I find that the RAD's decision is entirely based on a reasonableness analysis of the RPD findings. There is no indication in the RAD's reasons for decision that an independent assessment of the evidence in connection with the issues raised by the Applicant was conducted. On all aspects of the key issue raised by the Applicant – which is that in making adverse credibility findings with respect to her addresses and the delay in making her refugee protection claim, the RPD engaged in an overzealous microscopic analysis of the evidence and made unjustified plausibility findings – the RAD came to the conclusion that the RPD's findings were reasonable and fell within a range of possible, acceptable outcomes defensible in regard of the fact and the law (RAD's decision, at paras 40 to 42). This inescapably goes to the heart of the reasonableness analysis.

[10] At the hearing, counsel for the Respondent insisted that sending back the matter to the RAD for re-determination would be pointless in the particular circumstances of this case as, even assuming the RAD did not apply the proper standard of review, the impugned decision must stand because the RAD did make its own analysis of the issues before it, especially the Gender Guidelines issue. This, I am afraid, falls short of salvaging the RAD's decision. It remains that on its main components, the RAD approached this appeal as if it was just another form of judicial review.

[11] In all fairness to the RAD member who rendered the impugned decision, when the decision was issued on April 2014, this Court had yet to comment on the role of the RAD as an appellate body and the standard against which it was to review decisions of the RPD. What

matters, however, is that by deciding as it did, the RAD deprived the Applicant access to the appeal process Parliament created to the benefit of failed refugee claimants.

[12] This error is dispositive of the present judicial review application.

[13] While the Applicant had a question for certification to propose if his application for judicial review was dismissed, the Respondent had none. No question will therefore be certified although, it is worth mentioning that, questions relating to the issue of the appropriate type of review to be undertaken by the RAD, when adjudicating an appeal from an RPD decision, have, to date, been certified in at least five cases (*Huruglica*; *Triastcin*; *Yetna*; *Akuffo;* and *Spasoja*, above).

ORDER

THIS COURT ORDERS that:

1. The application for judicial review is granted;

2. The decision of the Refugee Appeal Division, dated April 16, 2014, is set aside and the matter is remitted back to a different member for re-determination;

3. No question is certified.

"René LeBlanc"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-3894-14
STYLE OF CAUSE:	OKSANA SHUMSKA v THE MINISTER OF CITIZENSHIP AND IMMIGRATION
PLACE OF HEARING:	TORONTO, ONTARIO
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