Federal Court  Cour fédérale

Date: 20160526

Docket: IMM-4851-15

Citation: 2016 FC 573

Ottawa, Ontario, May 26, 2016

PRESENT: The Honourable Mr. Justice Diner

BETWEEN:

FIKRETE SHALA

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Background

[1] This is a judicial review, pursuant to subsection 72(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [the Act], of a decision by the Refugee Appeal Division [the RAD] of the Immigration and Refugee Board confirming a decision by the Refugee Protection Division [the RPD] rejecting the Applicant's claim for refugee protection.

[2] The Applicant is 52-year old citizen of Kosovo. She alleges that her husband emotionally, physically and sexually abused her since shortly after they married in 1986 until a particularly brutal incident in 2012. She then fled Kosovo on June 3, 2013, ultimately making her way to Canada in March 2015.

[3] Before the RPD, the Applicant submitted, among other pieces of evidence, a psychiatric report diagnosing her with a "mild Major Depressive Episode", including post-traumatic stress disorder symptoms, suicidal ideations and a "somewhat anxious, obsessional personality (probably within normal limits)". That report was based on one visit with a psychiatrist in Canada.

[4] The Applicant also submitted country condition documentation suggesting that while Kosovo had legislation in place to combat domestic violence, the implementation of that legislation was inadequate. She argued that the relevant National Documentation Package [NDP] affirmed this assessment and that it was objectively unreasonable, in light of her psychiatric report, to have expected her to seek state protection in Kosovo. The RPD, however, rejected her claim, finding that, while her narrative was credible, the Applicant had not rebutted the presumption of state protection. She appealed to the RAD shortly thereafter.

[5] The RAD, in its decision, agreed with the RPD that the Applicant could have approached the state for protection but did not and thus that the presumption of state protection had not been rebutted. In considering the psychiatric report, the RAD noted that no evidence had been provided to suggest that the Applicant had sought any further treatment or visit after the initial

diagnosis. The RAD also observed in its words, that no "formal testing" was done by the psychiatrist; the Applicant self-reported her story and symptoms to the psychiatrist without corroborating documentation; there were no signs of alleviated stress levels during her RPD hearing; the Applicant made no requests for special consideration for that hearing; and the Applicant's counsel only briefly raised the psychiatric report when making submissions.

[6] As for the country condition analysis, the RAD also upheld the RPD's findings, rejecting the claim that it had been selective in its assessment of the documentary evidence. The RAD concluded that, while it would have preferable for the RPD to have considered the report, there remained insufficient evidence to demonstrate that it was not reasonable for the Applicant to seek state protection.

II. Analysis

[7] The Applicant raises two issues, asserting that the RAD (i) unreasonably dismissed and did not consider the Applicant's mental health; and (ii) failed to consider the impact of her mental health on her ability to seek state protection.

[8] Preliminarily, the Federal Court of Appeal recently clarified that the standard of review the RAD should apply when reviewing RPD decisions is correctness, conducting "its own analysis of the record to determine whether, as submitted by the appellant, the RPD erred" (*Canada (Citizenship and Immigration) v Huruglica*, 2016 FCA 93 at para 103 [*Huruglica FCA*]). The RAD's selection of a standard of review must then be reviewed by this Court on a reasonableness standard (*Huruglica FCA* at para 35).

[9] Here, the RAD selected and applied the standard laid out in *Huruglica v Canada (Citizenship and Immigration)*, 2014 FC 799 at para 54 [*Huruglica FC*], a standard which has since been supplanted by the approach offered in *Huruglica FCA*. Selecting the *Huruglica FC* standard, however, does not mean that the RAD has committed a reviewable error: so long as the RAD conducted, in substance, a thorough, comprehensive, and independent review of the kind endorsed in *Huruglica FCA*, the RAD's selection and application of a standard of review was reasonable (*Ketchen v Canada (Citizenship and Immigration)*, 2016 FC 388 at para 29). This is especially true, where, as in this dispute, credibility was not an issue before the RAD (*Huruglica FCA* at para 71).

[10] As for the RAD's assessment of the facts and its application of the state protection analysis, they are reviewable on a reasonableness standard (*Moya v Canada (Citizenship and Immigration)*, 2016 FC 315 at para 32). As such, if the RAD's decision on these issues falls within a range of possible, acceptable outcomes that are defensible in respect of the facts and the law and is justifiable, transparent and intelligible, it should not be disturbed (*Dunsmuir v New Brunswick*, 2008 SCC 9 at para 47).

[11] On the first issue – the RAD's failure to properly consider the psychiatric evidence – the Applicant submits that it was an error to reject the psychological evidence without a permissible basis. The report should not have been discounted because it was based on self-reporting (*Lainez v Canada (Citizenship and Immigration)*, 2012 FC 914 at para 42). Similarly, the RAD member does not have the training and expertise of a mental health professional and is thus not competent

to dismiss the report on the basis of insufficient "formal testing" (*Gyarchie v Canada (Citizenship and Immigration)*, 2013 FC 1221).

[12] Furthermore, the Applicant contends that it was unreasonable for the RAD to question the severity of her mental condition based on the fact that she did not display any outward signs of stress during the hearing and did not make any requests for special accommodations as a victim of sexual assault. Citing *Shaker v Canada (Minister of Citizenship and Immigration)*, [1999] FCJ No 1077 at paras 9-10, the Applicant submits that a claimant's emotional state while recounting traumatic events should not serve as an indicator of their credibility.

[13] Finally, the Applicant argues that it was unreasonable to draw a negative inference from either her counsel's limited focus on the subject of mental health at the hearing or the fact that no further medical evidence beyond the psychiatric report was tendered. The Applicant contends that counsel limited questions on the subject due to its sensitive nature. As for the lack of further evidence, the Applicant argues that she had no need to submit new evidence since she was arguing that the RPD unfairly ignored her mental health evidence entirely, rather than arguing that it had been minimized or misconstrued. Since appellants to the RAD are only allowed to submit new evidence to address errors made by the RPD in the appealed claim, there was no reason for her to adduce further proof of her mental health.

[14] On the second issue – the RAD's state protection analysis – the Applicant argues that, in light of her mental health issues, it was not objectively reasonable to expect her to contact the authorities in Kosovo. In other words, as an individual who suffers from anxiety and depression

and some symptoms of post-traumatic stress disorder, she could not have sought state protection, even if it were reasonably forthcoming. As such, the RAD erred in concluding that "there was insufficient evidence to demonstrate that it was not reasonable for the Appellant to seek out state protection" (Certified Tribunal Record at 8 [CTR]).

[15] I agree with the Applicant that there were several problematic elements to the RAD's assessment of the psychiatric report, in particular the RAD's reliance on the fact that the Applicant did not make any requests for special accommodation, and did not appear in distress in the RPD hearing. Neither of these details impugns or diminishes the psychiatric assessment in any way.

[16] Despite these problematic elements, I find the decision to be reasonable overall. This is because the RAD determined that the Applicant could have contacted state authorities for protection but did not, and I find nothing unreasonable about this conclusion, even in light of the psychiatric report.

[17] A refugee claimant's failure to test state protection is determinative to their claim, except where it would have been objectively unreasonable to do so (*Canada (Attorney General) v Ward*, [1993] 2 SCR 689 at 724). Claimants cannot evade this obligation because of subjective fear or reluctance to contact the authorities. Instead, they must submit evidence to demonstrate that reluctance or fear was objectively reasonable. As stated by Justice Rennie (then of this Court) in *Aurelien v Canada (Citizenship and Immigration)*, 2013 FC 707 at para 13, "an applicant's subjective fear will not be determinative of the question of state protection. Rather, the

jurisprudence requires that an applicant's perception be considered in light of the general country conditions and factors such as the applicant's age, social and cultural context".

[18] A claimant's psychological or mental health certainly should be considered as part of this contextual analysis, especially when there is evidence to support a particular diagnosis. A mental disorder is more than just a "subjective fear or reluctance" and must be treated as such. However, it is not clear to me how a diagnosis of depression and anxiety necessarily and determinatively demonstrates that the Applicant was unable, throughout over twenty-five years of marriage, to contact the authorities at any point. There is neither a statement to this effect in the report itself, nor anything else in the evidence submitted to support such a claim.

[19] I would also note that this Court has held that the RAD is entitled to deference in how it weighs and considers evidence. This is equally true as to the weighting it gives to expert evidence, including uncorroborated evidence in a psychiatric report. It was open to the RAD to be cautious about the report given that it was based on one meeting after nearly three decades, a period from which not a single other psychological report, or evidence of any consultation, was produced. Decision-makers may validly exercise caution in relying overly on untested expert evidence obtained for the purposes of litigation (see, for example, *Czesak v Canada (Citizenship and Immigration)*, 2013 FC 1149 at paras 37-39; *Molefe v Canada (Minister of Citizenship and Immigration)*, 2015 FC 317 at para 31; *Moya v Canada (Minister of Citizenship and Immigration)*, 2016 FC 315 at paras 58-59).

[20] That said, even if the RAD had given the psychiatric report the weight the Applicant suggests is reasonable, I do not see how that would have changed the outcome, particularly in light of the RAD's conclusion, based on the country condition evidence that state protection would have been reasonably forthcoming. As mentioned above, there is nothing before me to suggest that depression and anxiety would necessarily and automatically prevent a claimant from seeking state protection over the course of almost three decades. The RAD is entitled to deference on this point.

III. Conclusion

[21] In sum, I do not find that the RAD came to an unreasonable conclusion in its assessment of state protection in light of the psychiatric report. Though it made problematic findings relative to the scant questioning on the report by counsel and the lack of accommodation requested at the hearing, I do not find that those conclusions render the decision unreasonable overall. The crux of the matter is that both the RPD and RAD reasonably found that the requirement to seek state protection had not been satisfied and the Applicant had not demonstrated that she was exempt from that requirement, given the contextual factors surrounding this case. This application for judicial review is dismissed. There are no costs or certified questions.

JUDGMENT

THIS COURT'S JUDGMENT is that:

1. the judicial review is dismissed;
2. there are no questions for certification;
3. There is no costs order.

"Alan S. Diner"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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