

Federal Court



Cour fédérale

Date: 20190319

Docket: IMM-3648-18

Citation: 2019 FC 333

Ottawa, Ontario, March 19, 2019

PRESENT: The Honourable Madam Justice Kane

BETWEEN:

SICELIWE TENHLANHLA HLUBI

Applicant

and

**THE MINISTER OF CITIZENSHIP
AND IMMIGRATION**

Respondent

JUDGMENT AND REASONS

[1] Siceliwe Tenhlanhla Hlubi [the Applicant] seeks judicial review of a decision of the Refugee Protection Division [RPD], dated June 20, 2018, which found that she is not a Convention refugee or a person in need of protection as described in sections 96 and 97 of the *Immigration and Refugee Protection Act*, SC 2001 c 27.

[2] For the reasons elaborated upon below, the Application for Judicial Review is dismissed.

I. The Background

[3] The Applicant is a citizen of Swaziland who seeks refugee protection on the basis of alleged persecution based on gender, as a victim of domestic violence.

[4] The Applicant recounts that she married in 1999 without her family's approval and, as a result, was shunned by her family. The Applicant recounts that in 2008 she discovered that her husband was abusing alcohol and was unfaithful. She recounts that he began to abuse her emotionally, including insults and name calling. In 2010, the Applicant's husband was diagnosed with HIV and tuberculosis. The Applicant recounts that he became more aggressive due to his medication. She further recounts that after his recovery in 2011, he beat her and forced her to have unprotected sex. He also continued to bring other women to their home. The Applicant states that the police would not assist her and regarded this as a family matter. The Applicant left her husband and two children and arrived in Canada in April 2012.

II. The RPD Decision

[5] The RPD found that the determinative issue is credibility and concluded that the Applicant had fabricated her claim. The RPD found that the Applicant was not a Convention refugee or a person in need of protection.

[6] The RPD noted that the Applicant had filed all her documents only days before the hearing despite being in Canada for over six years. The RPD rejected the Applicant's explanation for filing the documents late, noting that she was familiar with the immigration

process and had received notice of her hearing in ample time to provide the documents in a timely way. The RPD noted that the Applicant had been represented by counsel and had retained new counsel in the past year, who had encouraged her to submit her documents. The Applicant's explanation that she intended to bring the documents to the hearing was not reasonable. The RPD noted that as a result of filing the documents late, particular documents would be given little weight.

[7] Despite its concerns regarding the late filing of the documents, the RPD assessed each document and made specific credibility findings.

[8] At the outset, the RPD noted that it could not ascertain the provenance of the documents related to the Applicant's identity, her medical records or the affidavits submitted. The RPD then reviewed all the documents and found that the documents had little or no probative value and that they raised substantial credibility concerns.

[9] The RPD concluded that it did not believe the Applicant's testimony or evidence and did not believe that she is a victim of domestic abuse. The RPD found that the Applicant had fabricated her claim for protection.

III. The Applicant's Submissions

[10] The Applicant submits that the RPD focused on the fact that her documents were filed late and failed to objectively assess her documents. She submits that the RPD repeatedly noted that the documents were filed late, making it impossible to discern whether the RPD based its

findings on the review of the documents or on their late filing. The Applicant submits that a document's relevance or credibility is not affected by being filed late.

[11] The Applicant further submits that the RPD erred by finding that the affidavits were irregular without any reference to country condition evidence regarding how affidavits are sworn and National Identity Cards are verified in Swaziland. The Applicant adds that the RPD's findings regarding her other evidence, including the affidavit of the Applicant's maid and her son's medical certificate, were based on speculation.

IV. The Respondent's Submissions

[12] The Respondent notes that the role of the Court is not to reweigh the evidence. The Respondent notes that the Applicant did not reasonably explain her delay in filing her documents. The Respondent notes that the Applicant had been in Canada for over six years before the RPD hearing and that the record includes the notices sent to the Applicant clearly directing her to submit all her documents at least 10 days in advance of the hearing.

[13] The Respondent submits that the RPD's decision is clear. First, the RPD set out its concerns regarding the lateness of the documents and its finding that the Applicant's explanation was not reasonable. Second, the RPD assessed all the documentary evidence and the Applicant's testimony and made specific findings, all of which are reasonable.

V. The Issues and Standard of Review

[14] The issue is whether the RPD's decision, which is based on finding that the Applicant's claim was not credible, is reasonable.

[15] The standard of review of issues of fact and issues of mixed fact and law is reasonableness. To determine whether a decision is reasonable, the Court looks for "the existence of justification, transparency and intelligibility within the decision-making process" and considers "whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law" (*Dunsmuir v New Brunswick*, 2008 SCC 9 at para 47, [2008] 1 SCR 190). Deference is owed to the decision-maker and the Court will not reweigh the evidence.

[16] Credibility is a factual issue. With respect to credibility findings, it is well-established that boards and tribunals—i.e., the decision-makers that hear the testimony and review the evidence—are ideally placed to assess credibility: *Aguebor v Canada (Minister of Employment and Immigration)*, [1993] FCJ No 732 (QL) at para 4, 160 NR 315 (CA). Their credibility findings should be given significant deference: *Lin v Canada (Citizenship and Immigration)*, 2008 FC 1052 at para 13, [2008] FCJ No 1329 (QL); *Fatih v Canada (Citizenship and Immigration)*, 2012 FC 857 at para 65, 415 FTR 82; *Lubana v Canada (Minister of Citizenship and Immigration)*, 2003 FCT 116 at para 7, 228 FTR 43.

[17] In *Rahal v Canada (Minister of Citizenship and Immigration)*, 2012 FC 319 at paras 41-46, [2012] FCJ No 369 (QL) [*Rahal*], Justice Mary Gleason summarized the key principles from the jurisprudence regarding credibility. Justice Gleason explained why the Court's role in reviewing credibility findings is so limited, at para 42:

First, and perhaps most importantly, the starting point in reviewing a credibility finding is the recognition that the role of this Court is a very limited one because the tribunal had the advantage of hearing the witnesses testify, observed their demeanor and is alive to all the factual nuances and contradictions in the evidence. Moreover, in many cases, the tribunal has expertise in the subject matter at issue that the reviewing court lacks. It is therefore much better placed to make credibility findings, including those related to implausibility. Also, the efficient administration of justice, which is at the heart of the notion of deference, requires that review of these sorts of issues be the exception as opposed to the general rule. As stated in *Aguebor* at para 4:

There is no longer any doubt that the Refugee Division, which is a specialized tribunal, has complete jurisdiction to determine the plausibility of testimony: who is in a better position than the Refugee Division to gauge the credibility of an account and to draw the necessary inferences? As long as the inferences drawn by the tribunal are not so unreasonable as to warrant our intervention, its findings are not open to judicial review...

(see also *Singh* at para 3 and *He v Canada (Minister of Employment and Immigration)*, 49 ACWS (3d) 562, [1994] FCJ No 1107 at para 2).

VI. The Decision is Reasonable

[18] As noted above, the RPD's credibility findings are owed significant deference. The RPD had the opportunity to question the Applicant and to probe her responses. The RPD found these responses not to be credible and her explanations not to be reasonable.

[19] With respect to whether the RPD was influenced by the late filing of the documents in its assessment of their credibility, the RPD first addressed the lateness and then addressed credibility, regardless of being filed late. The RPD reasonably found that the Applicant's explanation for filing the documents late was not reasonable. In fact, it was not an explanation at all. Rather, she stated that she thought she could bring the documents to the hearing. This ignores the notices sent to her advising her to submit her documents 10 days in advance of the hearing. Although the RPD noted that the documents would be given little weight due to their late submission, the RPD went on to assess each document thoroughly and considered the Applicant's testimony with respect to the documents.

[20] I need not determine whether it is reasonable for a decision-maker to make credibility findings based only on the late provision of the supporting documents because that is not what the RPD did in the present case. Contrary to the Applicant's submission, the RPD's assessment of the documents was based on objective criteria, not influenced by the late filing. The RPD provided clear reasons for finding the documents lacking in credibility.

[21] The RPD found that the affidavit from Thoko Gwebu, a friend of the Applicant, described additional incidents and details of beatings suffered by the Applicant that were not reported by the Applicant in her own narrative. The RPD noted that the Applicant did not explain why this additional information was included, nor did she seek to update her Basis of Claim Narrative to include the incidents or details. The RPD found that the affidavit was written to bolster the Applicant's claim for protection. The RPD reasonably drew a negative inference from the affidavit.

[22] In addition, the RPD noted that the affidavit from Thoko Gwebu was sworn on May 16, 2018, but the affiant's National Identity Card was certified by a different commissioner of oaths a month before the affidavit and in a different location.

[23] The affidavits of three other persons were also found to have the same flaws—the affidavit and the National Identity Card were sworn at different times and places. The RPD reasonably found that it was not plausible that the affiants would have their National Identity Cards certified at different times than their affidavits were sworn. The RPD also reasonably found that it was not plausible that the affiants would have their National Identity Cards certified weeks or a month before the Applicant had even requested that they provide an affidavit to support her claim. These plausibility findings are well within the expertise of the RPD to make and do not require country condition evidence regarding how affidavits are sworn in Swaziland.

[24] The RPD reasonably found that the Applicant was untruthful regarding how she had obtained other documents. The RPD found the Applicant's evidence that her maid had gathered the Applicant's husband's medical records from his home to be implausible. The RPD noted that the maid's affidavit stated that she feared the Applicant's husband, who had threatened her. The RPD did not believe that the maid would continue to work in the Applicant's home long after the Applicant left the country and that she would risk gathering the documents, given the alleged threats from the Applicant's husband. The RPD also reasonably found that it was implausible that the Applicant's maid could have taken the husband's records and sent them to the Applicant undetected.

[25] The RPD also found that the Applicant's oral testimony further undermined the veracity of the affidavits. The RPD noted that the Applicant stated that her husband had known since 2014 that she was living in Canada. Therefore, the RPD concluded that the allegations of his threats to the maid and others to disclose the Applicant's whereabouts were not credible.

[26] The RPD reasonably gave no weight to a medical certificate for the Applicant's son as evidence of abuse by her husband. The RPD noted that the medical certificate indicated only that the patient had a broken arm, not how it was caused. The RPD also doubted the certificate because the gender of the patient was noted as female and the doctor's signature differed from the name on the stamp affixed. The RPD reasonably rejected the Applicant's explanation that she had given her son a female name, noting, among other things, that this did not explain why a doctor who had actually seen her son would note his gender as female.

[27] The RPD's findings related to credibility and plausibility are clearly explained and meet the criteria of justification, transparency and intelligibility.

JUDGMENT in IMM-3648-18

THIS COURT'S JUDGMENT is that

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

"Catherine M. Kane"

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: IMM-3648-18

STYLE OF CAUSE: SICELIWE TENHLANHLA HLUBI v THE MINISTER
OF CITIZENSHIP, AND IMMIGRATION

PLACE OF HEARING: TORONTO, ONTARIO

DATE OF HEARING: MARCH 6, 2019

JUDGMENT AND REASONS: KANE J.

DATED: MARCH 19, 2019

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