Federal Court  Cour fédérale

Date: 2019 0730

Docket: IMM-6100-18

Citation: 2019 FC 1025

Vancouver, British Colombia, July 30, 2019

PRESENT: Madam Justice St-Louis

BETWEEN:

NQOBILE BRILLIANT NDIMANDE

Applicant

and

MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Introduction

[1] Ms. Nqobile Brilliant Ndimande, the Applicant, seeks judicial review of the decision rendered by the Refugee Appeal Division (RAD) on November 14, 2018. The RAD dismissed Ms. Ndimande's appeal and confirmed the decision of the Refugee Protection Division (RPD) that she is neither a Convention refugee nor a person in need of protection, as per the power

granted by paragraph 111(1)(a) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [the Act].

[2] For the reasons exposed hereinafter, the judicial review will be dismissed.

II. Background

[3] Ms. Ndimande is a South African citizen from Empangeni, Richards Bay. On May 16, 2016, she entered the United States, holding a J1 visa valid from April 13, 2016 to May 16, 2017. On October 24, 2016, she entered Canada by foot from the United States, and claimed refugee protection the next day.

[4] She based her claim on fear of Mr. Solomuzi Mthalane, the man her family had arranged her marriage to, also from Richards Bay. As per the allegations in her Basis of Claim (BOC) form, CBSA interviews, statutory declaration, and hearing testimony, on December 1, 2015, after completing her studies in Durban, she returned to her parents' home and learned that her family had arranged her marriage to Mr. Mthalane. She refused to marry and to go to his house, so on December 5, 2015, he forcibly took her to his house and he raped her. The next day, she went to the police station to report the rape, but as she could not find help, she went to her brother's house, in Empangeni as well. Her brother was upset and called Mr. Mthalane; that same night, six men wearing balaclavas went to the brother's house and shot him and his wife. On December 7, 2015, Ms. Ndimande left for Durban to search for a safe place to live outside South Africa. On February 8, 2016, she took a vacation in Kampala, Uganda, to clear her head, and on March 7, 2016, she returned to Durban and applied for an American J1 visa to work as an au pair in the United States.

[5] On August 23, 2017, the Vancouver Association for Survivors of Torture provided a psychological assessment of Ms. Ndimande (the VAST letter), which states, *inter alia*, that in May 2017, Ms. Ndimande suffered a rape by someone she met through her previous roommate. The assessment identifies Ms. Ndimande as a vulnerable person and recommends that procedural accommodations be put in place during her testimony before the RPD.

[6] On September 7, 2017, the RPD held a hearing and heard Ms. Ndimande's testimony in person. Prior to the hearing, the RPD had declared Ms. Ndimande a vulnerable person pursuant to the *Chairperson's Guideline on Procedures with Respect to Vulnerable Persons Appearing before the IRB* and had applied the procedural accommodations requested by her counsel. The RPD heard Ms. Ndimande first, and her counsel questioned her subsequently. Before her counsel's examination, the RPD pointed out that the central issue was the internal flight alternative (IFA) (Tribunal Record at 59). Neither the RPD nor Ms. Ndimande's counsel referred to the rape she suffered in Canada or asked questions related to it, and Ms. Ndimande did not mention it. The RPD also heard the testimony of Ms. Nompumelelo, a witness from South Africa, with the help of a Zulu interpreter, both appearing by phone. On a few occasions, the Board member expressed that she had difficulty hearing the interpreter (Tribunal Record at 65, 76-77), and a reading of the transcript shows that the Board member tried to understand the witness's testimony by repeating the questions multiple times. Halfway through the testimony, the witness agreed to testify in English without the interpreter's help (Tribunal Record at 77). The transcript shows that a number of the witness's answers, or portion of answers, are marked as "indiscernible".

[7] While the RPD identified the existence of an IFA as the determinative issue, neither the RPD, nor the Applicant, nor her counsel raised or mentioned the second rape during the hearing or submissions.

[8] On September 27, 2017, the RPD found that Ms. Ndimande was neither a Convention refugee nor a person in need of protection pursuant to section 96 and subsection 97(1) of the Act. It confirmed having considered and applied the *Chairperson's Guidelines 4 with respect to Women Refugee Claimants Fearing Gender-Related Persecution* [*Chairperson's Guidelines 4*].

[9] The RPD rejected Ms. Ndimande's claim for refugee protection on the basis that she had an IFA in Cape Town. First, it found that she did not face a serious possibility of persecution or, on a balance of probabilities, a danger of torture or a risk to life or a risk of cruel and unusual treatment or punishment, as (1) Cape Town has a large population and is very far from Empangeni; (2) there is no sufficient credible evidence that Mr. Mthalane has the means necessary to locate her in a distant and large city such as Cape Town; and (3) there is no indication that Mr. Mthalane or his associates were able to contact or locate her during her four-month stay in Durban, and Cape Town is much farther away than Durban. Then, the RPD found that, given all the circumstances of this case, including Ms. Ndimande's personal circumstances, it would not be objectively unreasonable for her to relocate to Cape Town. The RPD considered objective evidence on the treatment of women in South Africa, as well as the fact that Ms. Ndimande is well-educated, has work experience, and has shown independence and resourcefulness previously. The RPD did not refer to the second rape mentioned in the VAST letter, nor did it directly address Ms. Ndimande's sexual assaults in its analysis, but cited country documents pertaining to sexual harassment, forced marriages, and domestic violence.

[10] Ms. Ndimande appealed, arguing that the RPD (1) failed to consider all her personal circumstances, namely the fact that she had been sexually assaulted twice, in relation to the reasonableness of the IFA; (2) "erred in law" in determining that it was unlikely for Mr. Mthalane and his associates to locate her in Cape Town (Tribunal Record at 109); and (3) breached her right to a fair hearing, as "the [transcript was] rife with instances of indiscernibility of the testimony of [Ms. Ndimande] and the witness", and that "[rather] than reflecting upon or analyzing such deficiencies in the hearing process […] the [RPD] simply proceeded to reach conclusions that were both unsupported by the evidence, and were unreliable considering the extremely poor quality of the audio in the hearing" (Tribunal Record at pp 126–127, paras 34–36). She stressed that this evidence "would likely not enable the RAD to properly revisit the [RPD's] findings with respect to the IFA due to the poor quality of the audio in the hearing" (Tribunal Record at 127; para 37).

[11] On November 14, 2018, the RAD dismissed the appeal.

[12] On the first issue relating to natural justice, the RAD reviewed the hearing transcript and listened to the audio recording of the hearing. Despite the difficulties with respect to the sound quality of the interpreted portion of the hearing, the RAD did not find that the witness's testimony was significantly compromised due to the efforts made by the RPD to understand what was being communicated. The RAD also noted that Ms. Ndimande's counsel before the RPD did not raise any concerns with respect to the testimony either during the hearing or in submissions. The RAD observed that the only parts of the recording that were difficult to make out happened during the interpretation of the witness's testimony and no central issue turned on that testimony.

In addition, the RPD made efforts to understand what was being communicated. The RAD thus found that Ms. Ndimande's right to a fair hearing had not been breached.

[13] The RAD also found that the RPD did not err in its analysis of the IFA and concluded that (1) there is insufficient trustworthy or credible evidence to establish that Mr. Mthalane would locate Ms. Ndimande if she was to relocate to Cape Town; (2) country documents describe several services available for victims of gender violence; (3) the RPD did not ignore the evidence of the two sexual assaults; and (4) the RPD had considered the ability of women, because of their gender, to travel safely to the IFA and to stay there without facing undue hardship.

[14] On December 7, 2018, Ms. Ndimande filed an application for leave and judicial review at the Federal Court against the RAD's decision.

III. Position of the parties

[15] Ms. Ndimande argues that the RAD erred in law by failing to (1) advise her of its conclusions with respect to the indiscernible aspects of the hearing transcript and to provide her with an opportunity to respond to the RAD's way of remediating such deficiencies; (2) analyze whether the RPD applied the *Chairperson's Guidelines 4*; (3) apply the proper test for IFAs to her circumstances; and (4) provide adequate reasons to support its finding that the RPD did not err in its analysis of the IFA as it relates to her circumstances.

[16] Ms. Ndimande submits that the first and second issues should be reviewed on the standard of correctness, whereas the third and fourth should be reviewed on the reasonableness standard.

[17] Although Ms. Ndimande lists the four issues above in her memorandum, there is no such clear delimitation in the analysis section of her memorandum, such that her arguments do not each clearly fit in a listed issue. It is thus useful to examine her arguments as she framed them in her documents and at the hearing.

[18] First, Ms. Ndimande submits that, once the RAD chose to resolve the deficiencies in the transcript, it had an obligation to provide her with an opportunity to respond, and relies on the decision of the Federal Court of Appeal in *Niedzialkowski v Canada (Minister of Employment and Immigration)*, [1992] FCJ No 459 (CA) [*Niedzialkowski*].

[19] Second, Ms. Ndimande raised a number of arguments with regards to the RAD's analysis of the second rape. She suggests that the RAD failed to provide adequate reasons for finding that the RPD did not ignore evidence of the sexual assault or did not fail to consider the reasonableness of her recourse for an IFA (*Newfoundland and Labrador Nurses' Union v Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62 [*Newfoundland*]). In addition, she pleads that the failure of the RPD to even mention the second sexual assault and the failure of the RAD to recognize this omission constituted errors in law, considering section C4 of the *Chairperson's Guidelines 4*. Finally, Ms. Ndimande points out that the RAD did not analyze her second sexual assault and limited itself to an examination of objective country evidence, and that such approach violates the principles of *Rasaratnam v Canada (Minister of Employment and Immigration)*, [1992] 1 FC 706 (CA) [*Rasaratnam*]). Moreover, she argues that the RAD must analyze the specific conclusions of the psychological report with regards to the second prong and that the RAD's finding with respect to her resourcefulness is gratuitous (*Sharbdeen v Canada (Minister of Employment and Immigration)*, [1993] FCJ No 634 (TD) at para 7).

[20] The Minister responds that the RAD's decision is reviewable on the standard of reasonableness and that the ability to respond to new issues on appeal is reviewable on a correctness standard (*Canada (Citizenship and Immigration) v Singh*, 2016 FCA 96 at para 29; *Oluwaseyi Adeoye v Canada (Citizenship and Immigration)*, 2018 FC 246 at para 9 [*Oluwaseyi Adeoye*]).

[21] The Minister submits that Ms. Ndimande's arguments amount to disagreement with the RAD's weighing of the evidence and should be dismissed (*Moute v Canada (Minister of Citizenship and Immigration)*, 2005 FC 579 at para 17). He adds that the RAD did not breach procedural fairness, because there is no duty to provide an applicant with an opportunity to respond in an appeal if no new issue is raised (*Oluwaseyi Adeoye* at para 12), nor any statutory obligation to record hearings before the RPD (*Antunano Martinez v Canada (Citizenship and Immigration)*, 2019 FC 744 at para 7 [*Antunano Martinez*]). In the present case, Ms. Ndimande has not shown how the RAD's assessment of the evidence gives rise to a new issue, and the RAD has the authority to evaluate if the record is sufficient.

[22] The Minister also submits that the RAD did not err in its IFA analysis, given that the RAD accepted the psychological assessment and weighed it against the whole of the evidence before it. The RAD properly considered the VAST letter's recommendations, which do not contain information to the effect that Ms. Ndimande would be unable to relocate because of her mental health issues. The Minister adds that, although Ms. Ndimande may have experienced severe trauma, an application for refugee protection is not an application for humane and compassionate considerations (*Ganghus v Canada (Minister of Citizenship and Immigration)*, 2004 FC 478 at para 5).

IV. Decision

A. *Standard of review*

[23] For issues of procedural fairness, the Court must determine whether the procedure was fair having regard to all circumstances (*Canadian Pacific Railway Company v Canada (Attorney General)*, 2018 FCA 69 at para 54). The standard of review applicable to a finding of a viable IFA is that of reasonableness (*Singh v Canada (Citizenship and Immigration)*, 2019 FC 727 at para 7).

B. *Procedural fairness before the RAD*

[24] Ms. Ndimande has provided no authority to support her argument that the RAD must give her an opportunity to respond when it proceeds to evaluate the adequacy of the record. The decision of the Federal Court of Appeal in *Niedzialkowski*, which Ms. Ndimande relies upon, does not pertain to this issue.

[25] When the RAD raises a new issue, procedural fairness requires it to give the parties an opportunity to respond (*Antunano Martinez* at para 15). However, in the present case, there was no new issue at play, because the RAD did not find any error in the RPD's decision beyond the grounds of appeal as framed by the parties (*Zhang v Canada (Citizenship and Immigration)*, 2019 FC 870 at para 13). In fact, Ms. Ndimande herself raised the issue of the indiscernible parts of testimonies in her appeal memorandum before the RAD, while the RAD confirmed having been able to understand the hearing.

[26] Furthermore, as stated in *Patel v Canada (Public Safety and Emergency Preparedness)*, 2018 FC 804, at paragraph 34, "A contention that the incompleteness of the record of the proceeding under review violates the rules of natural justice will succeed only if the record before the reviewing court is insufficient to permit it to dispose of a potential ground of review properly". Ms. Ndimande has not demonstrated how the record relied upon by the RAD did not allow it to dispose of a ground of review properly. The Court consequently finds the RAD's conclusion reasonable and fair.

C. *Second prong of the IFA test*

[27] The test to determine the viability of an IFA is as follows: (1) there is no serious possibility, on a balance of probabilities, of the claimant being persecuted in the proposed IFA; and (2) the conditions in the proposed IFA must be such that it would not be unreasonable, upon consideration of all the circumstances, including of the claimant's personal circumstances, for the claimant to seek refuge there (*Gandarilla Martinez v Canada (Citizenship and Immigration)*, 2011 FC 1464 at para 18 [*Gandarilla Martinez*]; *Rasaratnam*).

[28] Ms. Ndimande takes issue with the analysis of the second prong given her personal circumstances. She argues that the failure of the RPD to even mention the second sexual assault and the failure of the RAD to recognize this omission constituted errors in law, considering section C4 of the *Chairperson's Guidelines 4*, which provides that "decision-makers should consider the ability of women, because of their gender, to travel safely to the IFA and to stay there without facing undue hardship." However, at paragraphs 45 to 50 of its decision, the RAD reviewed country documents describing the situation of women victims of gender and domestic violence in South Africa, and specifically mentioned a document from the RPD's Research

Directorate pertaining to the ability of women to relocate to Cape Town (RAD decision at para 47).

[29] The RAD does not explicitly signal that the RPD did not mention the second sexual assault in its analysis, but it does indicate that there is no more information about the incident than what is stated in the VAST letter, and that Ms. Ndimande was not questioned on it at the hearing, neither by the RPD, nor by her own counsel. The RAD stated that it did not find that the RPD ignored evidence of the assault (RAD decision at para 53). Given the facts at hand, and given that the RAD is not required to make an explicit finding on each constituent element leading to its final conclusion (*Newfoundland* at para 16), its conclusion is reasonable.

[30] At paragraph 54 of its decision, the RAD found that the RPD had considered the reasonableness of a woman's recourse to an IFA, i.e. the ability of women, because of their gender, to travel safely to the IFA and to stay there without facing undue hardship. In the following paragraphs, the RAD stated that it concurred with the RPD's findings, found that it would not be unduly harsh to expect Ms. Ndimande to move to Cape Town, and explained its reasoning.

[31] For both findings above, the RAD's reasons allow the Court to understand why it made its decision (*Newfoundland* at para 16) and the Court can conclude that the findings are within the range of acceptable outcomes.

JUDGMENT in IMM-6100-18

THIS COURT'S JUDGMENT is that the application for judicial review is dismissed.

No question is certified.

"Martine St-Louis"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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