Federal Court  Cour fédérale

Date: 20190923

Docket: IMM-5600-18

Citation: 2019 FC 999

Ottawa, Ontario, September 23, 2019

PRESENT: The Honourable Madam Justice McVeigh

BETWEEN:

A.B.

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondents

JUDGMENT AND REASONS

I. Nature of the Matter

[1] This is a judicial review of a decision of the Refugee Appeal Division (RAD) of the Immigration and Refugee Board (IRB), dated October 18, 2018, wherein it dismissed the Applicant's appeal from the Refugee Protection Division (RPD). The decision under review is a

redetermination of the appeal. In *AB v Canada,* 2018 FC 237 (*AB*), Justice Grammond granted an application for judicial review of the Applicant's first RAD decision.

II. Preliminary Matter

[2] In *AB,* Justice Grammond ordered that the Applicant's name be anonymized because she was an alleged victim of child abuse. I will adopt his reasons regarding this issue. At the hearing, I directed that the style of cause would be amended to refer to the Applicant by the initials A.B.

[3] I conclude that the RAD erred in its decision not to admit new evidence. I am of the view that the decision should be set aside and sent back to the RAD for redetermination.

III. Facts

[4] The Applicant was born on November 11, 2009. She is a citizen of Hungary and is ethnically Roma-Chinese. Her mother is ethnically Roma. Her father is a citizen of China, who lived with her mother in Hungary. The Applicant's claim for refugee protection is based on alleged sexual abuse by her father, witnessing domestic violence against her mother, and discrimination amounting to persecution on the basis of her ethnicity.

[5] In September 2013, the Applicant's mother filed a complaint with the Hungarian police that the father had sexually assaulted the Applicant. As a result of this complaint, the mother and aunt were interviewed by the police. The police did not interview the father or send the

Applicant for a medical examination. As well, the Applicant was interviewed by a criminal justice psychologist, who concluded that she was unlikely to have been sexually assaulted by her father. In March 2014, the police closed the file.

[6] In July 2014, the Applicant's mother called the police after being assaulted by the father. She alleged that the two police officers who responded to the call did not assist her because they don't get involved in family issues. Her brother then took her to receive emergency medical care. Following this incident, child protective services initiated proceedings for the removal of the Applicant from both parents. Faced with this, both of her parents signed a power of attorney allowing her aunt and uncle to remove her from Hungary.

[7] In September 2014, the Applicant, along with her aunt and uncle, arrived in Canada. The child protection proceedings were terminated when the Applicant left Hungary for Canada.

[8] The Applicant's mother came to Canada shortly thereafter. She was ineligible to make a refugee claim, so the Applicant's refugee claim was heard on its own. The Applicant was represented by a designated representative who is not her mother. However, her mother testified and provided evidence for her claim. The Applicant's mother applied for a PRRA, which was refused.

[9] On January 31, 2017, the Applicant's claim for refugee protection was dismissed by the RPD. On June 5, 2017, the RAD dismissed the appeal on the basis of the availability of state protection. On March 2, 2018, the Federal Court granted the judicial review application and

returned the matter for redetermination by the RAD. In its decision of October 18, 2018, the RAD rejected the reconsideration of the appeal.

IV. Standard of Review

[10] The appropriate standard of review for questions of mixed fact and law arising from the RAD's decision is reasonableness (see e.g. *Diaz Pena v Canada,* 2019 FC 369 at para 29).

V. Issues:

[11] The Applicant set out the issues as being:

a) Whether the RAD erred in rejecting the new evidence?

b) Whether the RAD erred in its credibility assessment?

c) Whether the RAD's state protection analysis was unreasonable?

d) Whether the RAD erred in finding the claim was not well-founded?

e) Whether the RAD erred in rejecting the *sur place* claim?

f) Whether the RAD erred in concluding that the Applicant was not a Convention refugee on the basis of her exposure to domestic violence?

[12] As the first issue is dispositive of this judicial review, I will not address the other issues.

(1) *New Evidence*

[13] On appeal, the Applicant submitted four new documents as evidence:

- Statutory declaration of the Applicant's mother, dated March 15, 2017;
- USDOS Report 2016 for Hungary;
- Statutory declaration of the Applicant's mother, dated August 9, 2018;
- National Documentation Package (NDP) for Hungary, dated April 30, 2018.

[14] The RAD accepted the mother's statutory declaration dated March 15, 2017, which stated that her PRRA application had been unsuccessful. The RAD also accepted the USDOS Report and the updated NDP.

[15] The RAD did not accept the mother's statutory declaration dated August 9, 2018. The RAD noted that in it she stated that the Applicant's father continues to harass her sister in Budapest and that he last contacted her sister "a few months ago." It also reiterated her fears that the Applicant would witness domestic violence, face harm from her father or be removed from her care if she were to be returned to Hungary.

[16] The RAD found that the information in the statutory declaration was vague and that they had insufficient information to conclude that this information could not have been provided at the time when the RPD rejected her claim, in accordance with Rule 3(3)(g)(iii) of the *Refugee*

Appeal Division (RAD) Rules, SOR/2012-257. In the alternative, the RAD found that the statutory declaration did not meet the newness and credibility factors set out by the Federal Court of Appeal in *Canada (MCI) v Singh*, 2016 FCA 96 (*Singh*). The RAD found that it was too vague to be reliable, as it lacked details about whether there were specific threats and what harm the father actually threatened. The RAD also found that the mother's reiteration that she was afraid for her daughter was not new.

[17] As none of the new evidence admitted raised a serious issue with respect to the Applicant's credibility, the RAD denied the request for an oral hearing.

(2) *Applicant's Argument: The RAD erred in rejecting the new evidence*

[18] The Applicant argues that the RAD improperly rejected the mother's statutory declaration dated August 9, 2018 as not meeting s. 110(4) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 (*IRPA*). The Applicant noted that while her mother did not offer a specific time frame for the continuing harassment of her sister in Hungary, she did specifically indicate that the harassment last occurred "a few months ago." Given that the RPD rejected the claim on January 31, 2017 and the declaration dated in August 2018 indicated a few months ago, it was clear that the harassment happened after the RPD decision.

[19] The Applicant argues that her aunt's continuing harassment is important because of the concern that the father could be violent toward the mother upon her return to Hungary, which, in turn, would affect the Applicant. The Applicant argued it displayed a pattern that the RAD

should have considered. It also supports the evidence before the RPD that, not only was the husband a threat at that time, but that he continues to be such a threat for the future.

[20] The Applicant further argues that the RAD erred when it found that the evidence failed to meet the *Singh* test. The Applicant said that the statutory declaration of the mother should have been admitted, given it was relevant and probative, and then if there were concerns the decision maker could have dealt with it by giving it little or no weight instead of not accepting it as evidence (*Cabellos v MCI* 2019 FC 40 para 23).

[21] The Applicant argues that although the evidence was admittedly vague, it was unreasonably rejected because the details could have been clarified through an oral hearing pursuant to s. 110(6) of the *RAD Rules,* given that this all goes to credibility. The Applicant argues that rejecting the evidence where there is a possible cure for defects is unreasonable, particularly given that the Applicant is a child who depends on her mother for evidence.

[22] The Applicant argues that when the RAD takes such a narrow view, it is not complying with its purpose as a safety net, as set out in *MCI v Huruglica*, 2016 FCA 93 at para 98.

[23] The Respondent argues that the statutory declaration is very vague and contains no new evidence that post-dates the RPD's decision, as this was alleged throughout the proceeding. Furthermore, the Respondent says nothing turns on this evidence if it had been admitted and it did not affect the credibility of the Applicant herself, so there was no need for an oral hearing.

[24] In my opinion, it was unreasonable for the RAD to refuse to accept the Applicant mother's statutory declaration. As argued by the Applicant, a clear reading of the statement that her sister was harassed a "few months ago" indicated that it was not evidence available before the RPD's rejection of the claim in January 2017.

[25] Further, it was unreasonable of the RAD to find that the evidence did not meet the newness and credibility criteria set out in *Singh.* Although the evidence dealt with the ongoing allegations of risk to the child, continued harassment of the Applicant's aunt by the father was relevant and constituted new information in the determination of the claim. This is illustrated by the RAD's comments regarding a lack of risk of persecution on the basis of exposure to domestic violence against the mother.

[26] I further accept the Applicant's argument that although the evidence was admittedly vague, it was unreasonable to reject it on the basis of credibility. In light of the Applicant's vulnerabilities as a minor and reliance on her mother to provide evidence, in my view, it was unreasonable of the RAD to outrightly reject the evidence, rather than accepting it and then determining whether to hold a hearing or re-examining the mother on the evidence.

[27] Having found the treatment of the new evidence to be unreasonable, as it is determinative of the matter, there is no need to deal with the other issues.

[28] This application is granted. I understand that new submissions will be requested by the RAD in the normal course of this re-determination. Therefore, the Order will be to refer the matter back to be re-determined by a different decision maker.

THIS COURT'S JUDGMENT is that:

1. The application is granted and sent back to be re-determined by a different decision maker;
2. The style of cause will be amended so that the Applicant will be referred to as A.B as directed at the hearing;
3. No question is certified.

"Glennys L. McVeigh"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-5600-18
STYLE OF CAUSE:	A.B. v MCI
PLACE OF HEARING:	TORONTO, ONTARIO
DATE OF HEARING:	JULY 16, 2019
JUDGMENT AND REASONS:	MCVEIGH J.
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APPEARANCES:

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