Federal Court Cour fédérale

Date: 20200723

Docket: IMM-2509-19

Citation: 2020 FC 774

[UNREVISED CERTIFIED ENGLISH TRANSLATION]

Ottawa, Ontario, July 23, 2020

PRESENT: The Honourable Mr. Justice Shore

BETWEEN:

GUEMAHA RODINE GEORGES

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Nature of the case

[1] This is an application for judicial review pursuant to subsection 72(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA], against a decision by an officer of the

Refugee Protection Division [RPD] rendered on March 28, 2019, rejecting the applicant's refugee protection claim.

II. Facts

[2] The applicant is a 29-year-old Haitian citizen. She lived in Haiti in the family home with her immediate family and her two paternal uncles until the age of 19. From 2010 to 2015, the applicant studied in Mexico.

[3] At the end of 2015, the applicant returned to Haiti for less than a month. After an anonymous threatening call, the applicant left Haiti for good in January 2016. Once back in Mexico, the applicant finished her university studies, and then joined her ill grandmother who lived in Orlando in the United States in August and September 2016. The applicant then went on a volunteer religious mission in Central America for around two months. The applicant returned to the United States on a tourist visa in January 2017 and then travelled to Canada in March 2017, to claim refugee protection.

[4] In her account enclosed with the Basis of Claim Form [BOC Form], the applicant raises five grounds for fear pursuant to sections 96 and 97 of the IRPA:

(a) Violence and death threats by one of the applicant's uncles;

(b) Threats and harassment by a classmate;

(c) Criminals breaking into the family residence;

(d) Existence of witchcraft in Haiti, which was allegedly a threat to her life; and

(e) Fear of rape in Haiti.

III. RPD decision

A. *Violence and death threats by one of the applicant's uncles*

[5] The RPD found that in regard to her uncle, the applicant did not establish that there was a valid fear of persecution within the meaning of the Convention or that she would personally be exposed, on a balance of probabilities, to a risk of torture, threat to her life or risk of cruel and unusual treatment or punishment should she return to Haiti. Overall, the RPD felt that the applicant had embellished her narrative with regard to the relationship with her uncle and it was inconsistent that the family would continue to live with this uncle when he had allegedly been violent with the entire family.

[6] In any event, the RPD concluded that even if these allegations by the applicant were true, they were over 10 years old; nothing in her account indicated, from any subsequent facts, that he was still a threat to her today. On this, the applicant amended her BOC Form, between the first and second hearing, to add threatening statements by this uncle in 2015, when she was temporarily in Haiti. The RPD concluded, however, that in this case, it was not a serious possibility of persecution or a threat to her life.

B. *Threats and harassment by a classmate*

[7] The facts at the root of this fear date back to 2002 or 2003, when one of the applicant's classmates, who was allegedly interested in her romantically, harassed and threatened her. This classmate was allegedly kept away from the applicant by her father and her other paternal uncle.

The applicant alleges that her classmate subsequently made death threats against her, took a weapon to school in 2004 or 2005, and was then expelled. In 2015, the applicant received an anonymous call from a man who ordered her to go out with him under threat of being kidnapped. Based on hearsay from her friends, the applicant attributed this call to her former classmate. When confronted with the fact that nothing happened between 2005 and 2015, the applicant added at the hearing that another event allegedly took place during a funeral service when that classmate pointed at her and said [TRANSLATION] "that's her" to his friends in a threatening manner.

[8] Overall, the RPD considered that the contradictions and inconsistencies in the applicant's testimony undermined her credibility. While the death threats and harassment by her classmate seem to have been determinative in the applicant's departure from Haiti, she does not recall exactly in which years these incidents allegedly took place. Additionally, the RPD found that nothing in the applicant's narrative indicated that this classmate was still around and looking for the applicant more than 10 years after the events. As a result, the RPD concluded that the applicant did not show that the former classmate was a threat to her.

C. *Criminals breaking into the family residence*

[9] The applicant alleges that four armed criminals entered the family residence on October 5, 2006, pointed a weapon at her head and beat her father. The RPD found that this was an isolated incident that occurred around 13 years ago and, according to the applicant's father's account, was a simple burglary. Similarly, neither the applicant nor her family reported that there

was currently an individualized threat of criminals that would again target the applicant. As a result, the RPD concluded that this was not a threat to her life pursuant to the IRPA.

D. *Existence of witchcraft in Haiti, which was allegedly a threat to her life*

[10] The applicant alleges that certain acts of witchcraft in Haiti are forcing her to leave the country. During her travels, the applicant allegedly met with Argentinian pastors in Mexico who had a vision about her. God allegedly revealed himself to them and told them there was a threat hanging over her if she were to return to Haiti. The RPD found that the applicant was within her right to believe this threat, but that this could not be considered to be an objective basis for a refugee protection claim.

E. *Fear of rape*

[11] The applicant alleged a fear of rape in Haiti because she is a young woman. The RPD found that it is not enough to say a social group is at risk of violence and that the applicant is part of that group to conclude that the tribunal should allow the refugee protection claim. The RPD stated that it is necessary to analyze the applicant's profile, individualize the risk and explain how the applicant would face a serious threat of rape should she return to Haiti.

[12] On this, the RPD noted that the applicant is educated and resourceful, she has travelled in several Central American countries, she has no dependents, and she has several family members who still live in Haiti, with whom she is still in contact and who are concerned for her well-

being. As a result, the applicant has not shown that her profile corresponds to that of a single and vulnerable woman who would be persecuted should she return to Haiti.

IV. Analysis

[13] In this application for judicial review, the applicant is essentially raising two issues: alleged breaches of procedural fairness and the reasonableness of the decision about the risks the applicant faces as a Haitian woman.

A. *Alleged breaches of procedural fairness*

[14] The applicant stutters when she speaks, but she states that she expresses herself well in French. This speech impairment would have contributed to the fact that the hearing originally scheduled for three hours stretched over three half-days, for a total of eight hours of testimony by the applicant.

[15] The applicant alleges instead that the RPD is responsible for this long testimony as it constantly interrupted her. The applicant submits that the Member breached procedural fairness by not allowing her to testify fully and make herself understood. More specifically, the applicant alleges that the Member repeated her words several times, distorted them and did not openly and actively listen to her.

[16] During the first hearing before our Court, the applicant only submitted the transcripts from the three hearing days, which did not allow for the stuttering, alleged interruptions or lack

of active listening to be discerned, from the text alone. As a result, the hearing was adjourned to allow the applicant to provide the Court with the recordings in question. After the adjournment of the Court's hearings as a result of COVID-19, the parties agreed that the Court would rule on this case in writing; as a result, the hearing did not continue as initially planned.

[17] *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 [*Vavilov*], did not change the law as it applies to the judicial review of procedural fairness, except marginally with regard to the concept of justification and the transparency of reasons (which was not raised in this case). (See The Hon. Simon Ruel, *The Review of Procedural Fairness Post-Vavilov: More of the Same?*, 33 Can. J. Admin. L. & Prac. 159.) The decision in *Canadian Pacific Railway Company v Canada (Attorney General)*, 2018 FCA 69 [*CPR*], is still precedential. In *CPR*, the Federal Court of Appeal states the approach a court in a judicial review should take when determining whether a decision-maker has breached the procedural fairness obligations it has to an applicant:

> [54] **A court assessing a procedural fairness argument is required to ask whether the procedure was fair having regard to all of the circumstances, including the *Baker* factors**. A reviewing court does that which reviewing courts have done since *Nicholson*; it asks, with a sharp focus on the nature of the substantive rights involved and the consequences for an individual, **whether a fair and just process was followed**. I agree with Caldwell J.A.'s observation in *Eagle's Nest* (at para. 20) that, even though there is awkwardness in the use of the terminology, **this reviewing exercise is "best reflected in the correctness standard" even though, strictly speaking, no standard of review is being applied**.
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> [55] Attempting to shoehorn the question of procedural fairness into a standard of review analysis is also, at the end of the day, an unprofitable exercise. Procedural review and substantive review serve different objectives in administrative law. While there is overlap, the former focuses on the nature of the rights involved and the consequences for affected parties, while the latter focuses on

> the relationship between the court and the administrative decision maker. Further, certain procedural matters do not lend themselves to a standard of review analysis at all, such as when bias is alleged. As *Suresh* demonstrates, the distinction between substantive and procedural review and the ability of a court to tailor remedies appropriate to each is a useful tool in the judicial toolbox, and, in my view, there are no compelling reasons why it should be jettisoned.
>
> [56] No matter how much deference is accorded administrative tribunals in the exercise of their discretion to make procedural choices, **the ultimate question remains whether the applicant knew the case to meet and had a full and fair chance to respond**. It would be problematic if an *a priori* decision as to whether the standard of review is correctness or reasonableness generated a different answer to what is a singular question that is fundamental to the concept of justice – **was the party given a right to be heard and the opportunity to know the case against them? Procedural fairness is not sacrificed on the altar of deference**.
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> [Emphasis added.]

[18] The leading case with respect to the scope of the duty of procedural fairness remains *Baker v Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817. The duty of procedural fairness is flexible and variable and depends on the context in which the decision is made. Today, the applicant is raising what she alleges is not a structural violation arising from the procedure, but one essentially arising from the specific behaviour of the decision maker during the case before the RPD.

[19] After a complete reading of the transcripts and listening to the recordings from the three hearing days, the evidence does not indicate that the Member breached the applicant's procedural fairness; the applicant had the opportunity to be heard and understood.

[20] Indeed, the transcripts and recordings indicate that the Member asked the applicant many questions to get clarifications or to confirm her statements. While the applicant expresses herself clearly most of the time, at certain moments, she stutters such that it is difficult to understand her. The Member explained this in his reasons, that he had to interrupt the applicant's statements occasionally so she could repeat them. At other times, the Member asked questions to clarify the account and understand all of the facts raised.

[21] Similarly, the transcripts and recordings indicate that the Member was aware of the need to be attentive and open to the applicant's situation. The first day of the hearing took place with an interpreter, who systematically translated all of the Member's and the applicant's questions and answers. This language barrier, combined with the applicant's stuttering, caused some communication issues. However, the Member made sure to provide the applicant with an additional hearing day to complete her application.

[22] Aware of this issue, the applicant decided to only use the interpreter's services as needed during the other two hearings. Indeed, the second hearing took place in compliance with the applicant's right to procedural fairness. However, it seems that there was a dispute between the Member, counsel for the applicant and the applicant (see recording of the second hearing at 1:59 and 2:07). At one point, the Member sought clarifications about the events in Mexico. Counsel for the applicant and the applicant had the impression the Member was simply not listening to them. It was in this context that counsel for the applicant presented an application for recusal, which was then abandoned at the end of the third day of the hearing.

[23] That being said, although the situation was tense, the Member always seemed to be acting in good faith and trying to understand the applicant's account. The recording of these passages indicates a certain inability to understand in both parties, which is natural when a person telling their story does not provide some detail or another, forgetting that the listener does not have the same detailed knowledge of the story. This is why the Member attempted to clarify the story, to put it in the general context of the applicant's account and to ensure that he properly understood the events she was talking about. Several times during the hearings, the Member stated that he was concerned about making sure she was understood, that they would take the time needed to do this. The Member scheduled a third hearing to complete the applicant's testimony and allow counsel for the applicant sufficient time to ask all the questions she wanted to ask and make all her submissions.

[24] At the start of the third hearing, the Member stated that he had listened to the previous hearings again to prepare and that he only had a few questions to get clarifications. Then, counsel for the applicant had every opportunity to ask the questions needed to ensure that her client's story was fully understood. However, counsel for the applicant limited herself to a few questions, and her interventions accounted for at most three pages of the 258 pages of transcriptions for the three hearing days.

[25] While the Member did indeed ask the applicant many questions, the transcripts and recordings indicate that this was truly a positive effort to ensure he understood her entire account. The tone of the interventions and the general mood of the hearings was calm and conducive to the applicant's testimony, notwithstanding the dispute about the events in Mexico

that this Court does not consider to be a breach of procedural fairness towards the applicant. This being said, it must be noted that the applicant had the opportunity to be heard and to be understood.

B. *Application for protection based on the applicant's status as a Haitian woman*

[26] The applicant alleges that the RPD decision is unreasonable because [TRANSLATION] "the Member seems to have trivialized counsel's arguments and did not conduct an analysis as he should have" on the issue of gender-based fear. Thus, according to the applicant, the RPD should have concluded that the applicant was at risk within the meaning of section 97 of the IRPA because of her profile as a Haitian woman.

[27] The applicant is essentially asking this Court to review the reasonableness of the merits of the decision, to determine whether the RPD reasonably denied granting refugee status in light of the evidence on record. Further to *Vavilov*, when reviewing a decision on the standard of reasonableness, the Court must first consider the reasons given with respectful attention and seek to understand the reasoning process followed by the decision maker to arrive at its conclusion. The decision maker assesses and evaluates the evidence before it; absent special circumstances, this Court should not interfere with the factual findings of that decision maker (*Vavilov*, above, at para 125). That being said, the "reasonableness of a decision may be jeopardized where the decision maker has fundamentally misapprehended or failed to account for the evidence before it" (*Vavilov*, above, at para 126).

[28] With respect, this Court cannot find that the RPD decision was unreasonable. Contrary to the applicant's submissions, the RPD did not ignore the situation of women in Haiti. The RPD clearly established the applicable law in this case and reasonably concluded that the applicant, while a Haitian woman, did not show an individualized risk.

[29] The applicant's evidence had to establish that her risk of being the victim of an assault because of her profile was more than a mere possibility (*Dezameau v Canada (Citizenship and Immigration)*, 2010 FC 559 at paras 29 and 36 to 39). In this case, it was reasonable to conclude that the applicant did not meet this burden of proof.

[30] In fact, given her level of education, her past, her experiences and her numerous family relations in Haiti, it was not unreasonable to conclude that she was not a person in need of protection pursuant to section 97 of the IRPA.

V. Conclusion

[31] This Court can find no error in the officer's decision-making process and as a result, dismisses the present application for judicial review. No serious question of general importance is certified.

JUDGMENT in IMM-2509-19

THIS COURT'S JUDGMENT is as follows:

1. The application for judicial review is dismissed;

2. There is no question of importance to certify;

3. Pursuant to the *Department of Citizenship and Immigration Act*, SC 1994, c 31, the legal name of the Department should be the Department of Citizenship and Immigration. Additionally, the respondent notes an error in the spelling of the applicant's given name, which was confirmed by the applicant: the applicant's given name should be written GUEMAHA. The style of cause was corrected as a result.

"Michel M.J. Shore"
Judge

Certified true translation
This 25th day of August 2020.

Johanna Kratz, Translator

FEDERAL COURT

SOLICITORS OF RECORD

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