Federal Court  Cour fédérale

Date: 20220616

Docket: IMM-2956-21

Citation: 2022 FC 891

Vancouver, British Columbia, June 16, 2022

PRESENT: Justice Andrew D. Little

BETWEEN:

HALYNA PARANYCH
DIANA PARANYCH

Applicants

And

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

[1] This is an application for judicial review of a decision by the Refugee Appeal Division ("RAD") of the Immigration and Refugee Board dated April 6, 2021.

[2] The applicants claimed protection under section 96 and subsection 97(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 (the *"IRPA"*). The Refugee Protection Division ("RPD") heard their claim at a hearing on February 3, 2020.

[3] By decision dated May 4, 2020, the RPD concluded that the applicants had an internal flight alternative (“IFA”) in Kiev, Ukraine. The RAD dismissed an appeal from that decision.

[4] In this Court, the applicants submitted that the RAD’s decision was made without regard to the evidence and that its reasons were inadequate to assess the decision of the RPD. The applicants contended that both the RPD and the RAD should have concluded that they would not be safe to return to Ukraine and live in Kiev.

[5] I recognize the applicants’ experiences with violence inflicted on them. However, in my opinion, the RAD did not make the kind of error that permits this Court to intervene and set aside its decision. Specifically, it was not unreasonable for the RAD to decide not to admit five documents as new evidence and to decline to hold an oral hearing. In addition, the RAD reasonably assessed the evidence on whether the applicants were exposed to risks in Kiev on the evidence in the record. For the reasons set out in detail below, the application will be dismissed.

[6] It is important to note that the hearing before the RPD, the appeal to the RAD and the hearing of the application in this Court all occurred before hostilities began in Ukraine in 2022. This application has been determined on the evidence about risks in Ukraine prior to 2022.

I. Facts and Decisions Leading to this Application

[7] The applicants are mother (Halyna Paranych) and daughter (Diana Paranych). They are citizens of Ukraine. Prior to their arrival in Canada, they lived in a town in Ukraine called Ternopil. It is approximately six hours by car from Kiev.

[8] The applicants grounded their claim for protection under the *IRPA* on their fear that they would be killed or seriously harmed by the Director of a school in Ternopil. Halyna Paranych was a teacher at that school. She alleged that the Director told her to bribe her students to give them good marks, so that she could then give him the money. She refused. As a result, the Director sent his "goons" to attack her and her children on several occasions in Ternopil. Two men attacked her daughter, Diana, in December 2015. They severely injured Diana's elbow, resulting in restricted movement of her limb.

[9] The applicants left Ukraine for Canada in May 2016. They filed their claim for refugee protection in February 2019.

[10] The RPD held that the determinative issue was the IFA. The RPD concluded that the applicants had a viable IFA in Kiev.

[11] The applicants appealed to the RAD. They attempted to file new evidence. That evidence related to their claim that in July 2014, they moved to Kiev briefly and immediately had to return to Ternopil because the Director's "goons" located them in Kiev. The proposed new evidence included five documents:

a) train tickets dated July 1, 2014;

b) a complaint to the police dated July 6, 2014;

c) a medical certificate dated June 28, 2020, indicating that the applicant came to a private clinic on July 6, 2014 with bruising under her eyes and on her left cheek;

d) an affidavit from a landlord in Kiev dated June 26, 2020, advising that the applicants rented a house from him for a period of one year beginning on July 2, 2014 but left their home and terminated the contract a week later on July 7, 2014 and left; and

e) a lease dated July 2, 2014 for residential premises in Kiev.

[12] The RAD declined to accept any of these documents as new evidence under section 110 of the *IRPA*. The RAD also declined to hold an oral hearing under subsection 110(6).

[13] In its decision, the RAD analyses the merits of the appeal on IFA issues, concluding that the RPD did not err in its analysis of the IFA.

II. New Evidence on this Application

[14] The applicants filed a new affidavit in this Court sworn on October 6, 2021 by the applicant Halyna Paranych. In substance, it explained how she and Diana have suffered and were mistreated and harmed by the "goons" of the Director. The affidavit described the beatings suffered by Diana and the injuries she sustained to her left elbow on December 15, 2015, which have required surgery both in Ukraine and recently in Canada. The affidavit also set out the injuries suffered by Halyna Paranych and the resulting surgery, together with the psychological impact of these injuries. The affidavit attached medical records and photographs.

[15] The respondent objected to the admission of this affidavit as evidence in this Court, arguing that it provided information that was not before the RAD that goes to the substantive merits of the RAD's decision and attached documents that attempt to support the refugee claims. The respondent submitted that the applicants had not referred to any exceptions to the usual rule that only evidence before the decision-maker is admissible on a judicial review application. According to the respondent, the affidavit evidence, on its face, did not meet any of the exceptions to the general rule. The respondent also doubted the relevance of the evidence to the Court's decision. The respondent submitted that the affidavit should either be struck or disregarded.

[16] I agree with the respondent that on an application for judicial review, the general rule is that the evidentiary record before the reviewing court is restricted to the evidentiary record that was before the administrative decision-maker. Evidence that was not before the decision-maker and that goes to the merits of the matter is not admissible on an application for judicial review: *Association of Universities and Colleges of Canada v Canadian Copyright Licensing Agency (Access Copyright)*, 2012 FCA 22, at para 19; *Delios v Canada (Attorney General)*, 2015 FCA 117, at para 42; *Perez v Hull*, 2019 FCA 238, at para 16.

[17] The Federal Court of Appeal in *Perez* and in *Association of Universities* described three exceptions to the general rule: (i) an affidavit that provides general background in circumstances where that information might assist the court in understanding the issues relevant to the judicial review; (ii) an affidavit that is necessary to bring procedural defects to the court's attention that cannot be found in the evidentiary record of the administrative decision maker, to enable the

court to fulfil its role of reviewing the decision for procedural unfairness; and (iii) an affidavit that highlights the complete absence of evidence before the decision-maker when it made a particular finding. There may be additional exceptions, as the list is not closed. See the discussions in *Perez*, at para 16, and in *Association of Universities*, at para 20.

[18] The applicants did not submit that the affidavit met any of the exceptions in *Association of Universities*. They characterized the new evidence as an update about their respective injuries. That is true as far as it goes. However, the applicants must also have tendered the evidence to emphasize the severity of the physical beatings they suffered in Ukraine. On that issue, the respondent is correct that the evidence goes to the merits of their claim for protection under the *IRPA*.

[19] Accordingly, the general principle applies and the affidavit evidence is not admissible on this application.

III. Standard of Review to be applied on this Application

[20] The parties agreed that this Court must apply the reasonableness standard of review, as described in *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65. Reasonableness review entails a sensitive and respectful, but robust, evaluation of administrative decisions: *Vavilov*, at paras 12-13. In conducting a reasonableness review, a court must consider the outcome of the administrative decision in light of its underlying rationale in order to ensure that the decision as a whole is transparent, intelligible and justified: *Vavilov*, at para 15.

[21] The starting point is the reasons provided by the decision maker: *Vavilov*, at para 84. The Court's review considers both the reasoning process and the outcome: *Vavilov*, at paras 83 and 86. The reviewing court must read the reasons holistically and contextually, and in conjunction with the record that was before the decision-maker: *Vavilov*, at paras 91-96, 97 and 103; *Canada Post Corp. v Canadian Union of Postal Workers*, 2019 SCC 67, at para 31. A reasonable decision is one that is based on an internally coherent and a rational chain of analysis and is justified in relation to the facts and law that constrain the decision maker: *Vavilov*, esp. at paras 85, 99, 101, 105-106 and 194.

IV. Analysis

A. *The RAD's Decision not to Admit New Evidence under IRPA subsection 110(4)*

[22] In my opinion, the outcome of this application turns principally on the RAD's conclusions about the admissibility of the five pieces of new evidence related to the applicants' brief time in Kiev in early July 2014. The RPD and RAD both concluded that the applicants had a viable IFA in Kiev. If the RAD committed a reviewable error in not accepting the new evidence that the applicants attempted to live in Kiev, were found by the Director's "goons" within days of arrival and were immediately harmed, then this application would have to be allowed and the RAD would have to re-determine the matter with the potential admission of new evidence that could change the outcome of the applicants' claim for protection.

[23] However, having carefully considered the applicants' submissions, I cannot find a reviewable error in the RAD's reasoning or conclusions.

[24] First, the RAD referred to the correct legal test for the admission of new documents as evidence under subsection 110(4), including whether the evidence was new, credible and relevant in accordance with the Federal Court of Appeal's decision in *Canada (Citizenship and Immigration) v Singh*, 2016 FCA 96, [2016] 4 FCR 230.

[25] Second, the RAD gave two reasons for not admitting the new evidence. I see no reviewable error in either of those reasons.

[26] The RAD was aware that the documents related to the period in 2014 when the applicants were allegedly briefly living in Kiev, although two of the documents were created in 2020. The RAD considered the applicants' sole explanation for why they did not file the five documents with the RPD: they did not have the documents at the time of the hearing. The applicants advised the RAD that they tried unsuccessfully to locate the landlord in Kiev, but only received the documents after the hearing. The RAD found that the explanation for not providing the documents to the RPD was not satisfactory, because it did not explain the late submission of the three documents not related to the landlord or lease (i.e., the train tickets, complaint to the police, and medical certificate). In addition, the RAD noted that the relevant date for providing additional evidence was not the date of the RPD hearing but instead was the date of the RPD's decision, which occurred three months after the hearing. The RAD implied that the applicants could have sent additional evidence after the hearing, but before the decision, if they realized that they had forgotten to mention their brief move to and away from Kiev in July 2014 or obtained the landlord and lease documents sometime during that three-month period. In my view, the RAD's conclusion on this issue was not unreasonable.

[27] The RAD also found that the documents were not admissible because they were not credible. The RAD stated:

> This is the first time that Ms Paranych has ever mentioned being attacked by the director's goons in Kiev in this proceeding. She made no mention of such an attack either in her Basis of Claim narrative or her testimony at the hearing. In particular, when the RPD asked Ms Paranych why she would not be able to live safely in Kiev, she gave several reasons why the director would be able to find her in Kiev. However, she made absolutely no mention of attempting to relocate to Kiev and being found there by the director's goons in the past.

The applicants did not directly challenge this reasoning. I am unable to find any reviewable error in it. I note in addition that the applicants' written argument after the hearing at the RPD also did not mention any violent incidents that occurred while the applicants were briefly living in Kiev.

[28] Third, the applicants submitted that the RAD did not provide any reasoning for its conclusions. As is apparent from the discussion above, the RAD did provide reasons why it decided not to admit the proposed new evidence. In my view, those reasons provided sufficient justification as required by *Vavilov*.

[29] I therefore conclude that the applicant have not demonstrated that the RAD made a reviewable error when it decided not to admit new evidence under *IRPA* subsection 110(4).

B. ***The RAD's decision not to convene an oral hearing under IRPA subsection 110(6)***

[30] The applicants argued that the RAD's decision on the credibility of the documents was a conclusion that should have been made following an oral hearing. Specifically, the applicants

submitted that the RAD doubted the credibility of the applicant without providing her with a right to an in-person hearing to respond. The applicants referred to a possible breach of procedural fairness.

[31] In my view, the applicant's submission does not correctly reflect the contents and requirements of *IRPA* subsections 110(4) and 110(6). Issues about the credibility of the proposed new documents go to their admissibility under subsection 110(4), as interpreted by the Federal Court of Appeal in *Singh*. Under subsection 110(6), the RAD may hold an oral hearing if the admission of the documents raises an issue as to the credibility of the person who is subject to the appeal.

[32] In this case, the RAD did not admit the documents as new evidence, as it did not find the documents to be credible. The RAD's credibility finding was limited to the documents themselves, and not to the credibility of the applicant. So the possibility of a hearing under subsection 110(6) was not triggered. The applicants did not refer to any other legal basis for the RAD to convene a hearing.

[33] I therefore conclude that the RAD made no reviewable error and committed no breach of procedural fairness in not convening an oral hearing under *IRPA* subsection 110(6).

C. ***The RAD's IFA Analysis***

[34] The applicants made several related submissions concerning the RAD's and the RPD's analysis of Kiev as an IFA. Neither party took issue with the RAD's statements setting out the

two-pronged legal test for an IFA. The RAD referred to the Federal Court of Appeal's decision in *Ranganathan v Canada (Minister of Citizenship and Immigration)*, [2001] 2 FC 164 (CA).

[35] As noted above, the decision under review in this application is the RAD's decision, not the RPD decision. In addition, most of the applicants' submissions about the IFA analysis concerned the evidence from July 2014. They argued that they would actually be at risk in Kiev and that the outcome of the IFA analysis should have been different. These submissions focused on the first prong of the IFA analysis.

[36] Most of the applicants' arguments requested that the Court reweigh or reassess the evidence before the RAD and in doing so, the Court should consider the evidence found by the RAD to be inadmissible. However, the Court cannot substitute its opinion for the RAD's conclusion, with or without the inadmissible evidence. The Court is not permitted to reweigh the evidence in the record before the RAD, absent exceptional circumstances: *Vavilov*, at paras 125-126. In my view, there are no exceptional circumstances in this case. The applicants have not pointed to any evidence that the RAD allegedly ignored or to evidence inconsistent with the RAD's conclusion that was central or important to the IFA analysis or to the applicants' position, that it had to be addressed by the RAD.

[37] The applicants argued strenuously that the evidence before the RPD and the RAD proved that they have no safe IFA in Ukraine. However, the applicants did not submit evidence to the RPD about their purported failed move to Kiev in July 2014. There was no such evidence in their Basis of Claim form. Indeed, as the respondent observed on this application, the addresses in that

form only referred to one address in Ternopil, Ukraine and one in Canada. There was no reference to an address in Kiev.

[38] The applicants also challenged the RAD's analysis of two other issues. The first concerned whether the Director still had an interest in pursuing Halyna Paranych. She testified that her husband and son had been forced to go into hiding. The RPD found this claim was not credible. The applicants did not challenge that conclusion on the appeal to the RAD. Despite this, the RAD reviewed the evidence and agreed with the RPD's conclusion and with its reasons. Although the applicants made submissions on this issue to the Court, I see no basis that would enable this Court to consider an issue that was not appealed to the RAD, nor a reviewable error in the RAD's analysis.

[39] The applicants also challenged the RAD's analysis of whether they would still be at risk in Kiev (without the proposed new evidence). The RAD agreed with the RPD that the applicant's evidence of how the Director would be able to locate her in Kiev was speculative. Again, this Court cannot reweigh the evidence and come to a different conclusion. I cannot find that the RAD made a reviewable error on this issue.

[40] The applicants further submitted that the RPD and the RAD erred in law by requiring them to have already availed themselves of the IFA in Kiev before claiming refugee protection. I agree with the respondent that neither the RPD nor the RAD referred to such a requirement.

[41] Finally, the applicants submitted that the RPD's decision did not take into account evidence that it is possible to corrupt public servants in Ukraine, which would enable the Director to locate them in Kiev. This submission does not succeed. First, it is the RAD's decision that is under review in this Court, not the decision of the RPD. In addition, the applicants did not point to any evidence related to the corruption of public officials that is relevant or material to the present facts. The evidence that the police were allegedly unresponsive to the applicant's request for assistance is not sufficient to demonstrate a reviewable error.

V. Conclusion

[42] I conclude that there is no basis for this Court to conclude that the RAD's decision was unreasonable, applying the standards established by the Supreme Court in *Vavilov*.

[43] The application is therefore dismissed. At the hearing, the respondent requested that the word "Canada" be removed from the respondent's title in the style of cause. There was no objection and I agree.

[44] Neither party proposed a question for certification.

JUDGMENT in IMM-2956-21

THIS COURT'S JUDGMENT is that:

1. The style of cause is amended to reflect the correct name of the respondent as the Minister of Citizenship and Immigration.
2. The application is dismissed.
3. No question is certified under paragraph 74(*d*) of the *Immigration and Refugee Protection Act*.

"Andrew D. Little"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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