Federal Court Cour fédérale

Date: 20240118

Docket: IMM-951-22

Citation: 2024 FC 69

Toronto, Ontario, January 18, 2024

PRESENT: Justice Andrew D. Little

BETWEEN:

LILIA KARINA GONZALEZ PEREZ

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

[1] The applicant has challenged a decision of the Refugee Appeal Division (the "RAD") dated January 19, 2022.

[2] The RAD concluded that the applicant was neither a Convention refugee nor a person in need of protection under section 96 and subsection 97(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 (the *"IRPA"*).

[3] The applicant argued that the RAD's decision should be set aside for procedural unfairness, owing to failures by her previous representative before the Refugee Protection Division (the "RPD") and the RAD. She also argued that the RAD's decision was unreasonable under the administrative law principles in *Canada (Minister of Citizenship and Immigration) v. Vavilov, 2019 SCC 65,* [2019] 4 SCR 653.

[4] For the reasons that follow, I have concluded that the application must be dismissed.

I. Facts and Events leading to this Application

[5] The applicant, a citizen of Mexico, claimed protection on the basis of her sexual orientation.

[6] In January 2019, the applicant began dating a woman, C. The applicant learned that criminals had brought C from El Salvador to Mexico and that the criminals would beat C if she did not do the work required of her.

[7] In February 2019 the applicant gave C some money and C moved to the United States.

[8] The applicant realized she was being followed by unknown persons, who visited her home where she lived with her mother. These unknown persons were looking for C and apparently tried to a leave C a message that was either from her ill mother or about her.

[9] Shortly after, the applicant's and her mother's home was robbed. The applicant believed that the robbers were connected to the criminal organization searching for C because of the earlier suspicious visit to her home by the unknown persons who tried to leave a message for C.

[10] The applicant contacted C about the robbery. C advised that the applicant was in danger. The applicant moved elsewhere in Mexico before fleeing to Canada.

[11] In May 2019, the applicant arrived in Canada. On July 19, 2019, the applicant claimed protection under section 96 and subsection 97(1) of the *IRPA*.

[12] After her arrival in Canada, the applicant began a relationship with her partner, A.

[13] By decision dated September 10, 2021, the RPD dismissed her claim for *IRPA* protection.

[14] By decision dated January 19, 2022, the RAD dismissed her appeal and concluded that she was not at risk of persecution under *IRPA* section 96 and did not face adverse treatment under subsection 97(1).

[15] In this judicial review application, the applicant asked the Court to set aside the RAD's decision.

II. Issues Raised by the Applicant

[16] The applicant advanced the following positions:

A. the incompetence of her former representative, a paralegal licensed in Ontario, resulted in a breach of procedural fairness and a miscarriage of justice;

B. the RAD unreasonably concluded that the applicant was not credible, based on a single omission in her Basis of Claim ("BOC") narrative; and

C. the RAD unreasonably determined that the applicant did not face persecution in Mexico due to her sexual orientation, because its decision was not justified in relation to the country evidence for Mexico.

III. Analysis

A. Was the applicant denied procedural fairness owing to the incompetence of her former representative?

[17] The Court's review of procedural fairness issues generally attracts a fairness approach, akin to correctness. At a high level, the Court determines whether the procedure used by the decision maker was fair, having regard to all of the circumstances including the nature of the substantive rights involved and the consequences for the individual(s) affected: *Adeshina v Canada (Citizenship and Immigration),* 2022 FC 1559, at para 12; *Obasuyi v Canada (Citizenship and Immigration),* 2022 FC 508, at para 13. See generally, *Canadian Association of Refugee Lawyers v Canada (Immigration, Refugees and Citizenship),* 2020 FCA 196, [2021] 1 FCR 271, at para 35; *Canadian Pacific Railway Company v Canada (Attorney General),* 2018 FCA 69, [2019] 1 FCR 121, at paras 54-55.

[18] An applicant must establish three elements to show a breach of procedural fairness or natural justice on the basis of ineffective assistance of counsel or other representative in immigration proceedings:

a) The representative's alleged acts or omissions constituted incompetence;

b) There was a miscarriage of justice in the sense that, but for the alleged conduct, there is a reasonable probability that the result of the original hearing would have been different; and

c) The representative was given notice and a reasonable opportunity to respond.

See *Adeshina,* at para 13 (citing *Guadron v Canada (Minister of Citizenship and Immigration),* 2014 FC 1092, at para 11; *R v GDB,* 2000 SCC 22, [2000] 1 SCR 520, at para 26). See also *Ghorbanniay Hassankiadeh v Canada (Citizenship and Immigration),* 2023 FC 33, at para 8; *Zhou v Canada (Citizenship and Immigration),* 2022 FC 1046, at para 15; *Galyas v Canada (Citizenship and Immigration),* 2013 FC 250, at para 84.

[19] In this case, the applicant notified the former representative. I issued an Order granting intervener status to the former representative to make submissions at the hearing. I understand that as of the hearing of this application, the Law Society of Ontario has an open file related to this matter.

[20] The determinative issue on this application is the second criterion above. In my view, the applicant has not demonstrated that there is a reasonable probability that the result of the hearing would have been different absent the alleged incompetence of her former representative.

[21] The applicant position was that her representative instructed her not to include her partner in Canada, A, in her refugee claim and that if she had done so, the outcome of the RAD's decision would have been different. The applicant also submitted that her representative's assistant advised her to omit or minimize information when testifying at the RPD which, she maintained, was central to her ground of persecution. At the RPD hearing, the applicant testified about how she lives openly in Canada with her partner, but due to the representative's advice, A was not mentioned in her BOC narrative and A did not provide a letter of support for the applicant's claim for *IRPA* protection. The applicant advised that she has been open and public about that relationship including on social media platforms available to persons in Mexico.

[22] The information before the Court on this application raises factual issues about the communications between the applicant and her representative concerning whether to include A in her refugee claim. The resolution of these issues is not necessary to determine this application.

[23] In my view, the applicant has not shown a reasonable probability that the absence of evidence from A, or about her relationship with A, would have affected the outcome of the RPD's or the RAD's assessment of her risks of persecution or adverse treatment in Mexico under section 96 and subsection 97(1) of the *IRPA*.

[24] The RPD accepted that the applicant was a member of the LGBTQ+ community and assessed her claim accordingly. The risks to be assessed were in Mexico. The applicant met A in Mexico. They travelled to Canada together in May 2019 and subsequently entered into a committed relationship. The applicant did not suggest that A had any involvement in any of the

events that formed the basis of the applicant's claim for *IRPA* protection. A did not provide an affidavit about her potential testimony and the applicant did not attempt to summarize that possible evidence. While the applicant contended that the RPD's assessment of the risks "may have been different" if the claims were brought together and the RPD had additional information, it is unclear how any possible new evidence from or about A would imply any additional or different level of risk or possible harm than was assessed in the RPD's and RAD's decisions. In addition, the applicant has not suggested that any new or additional evidence related to the applicant's relationship with A would have affected the credibility issue that was determinative in the RPD's and RAD's decisions (which will be analyzed in section B, below). Finally, the applicant did not file evidence or argue that A was also unsuccessful in her refugee claim and that they will have to return to Mexico together to face different risks as a couple than the applicant would face individually.

[25] For these reasons, the applicant's first position on this application does not succeed.

B. Did the RAD make a reviewable error in its credibility analysis?

[26] As the parties submitted, and I agree, the standard of review for this issue is reasonableness. The Supreme Court's decision in *Vavilov* contemplates that a reviewing court may set aside an administrative decision if the applicant demonstrates that it was unreasonable because it was not transparent, intelligible and justified in relation to the facts and law that constrained the decision maker: *Vavilov,* esp. at paras 12-15, 83- 85, 99-106, 125-128.

[27] The applicant submitted that the RAD's determination that the applicant was not credible hinged on a single omission from her BOC. The BOC advised that unknown persons came to her home looking for her then-partner, C, and one of the neighbours told her mother that the unknowns wanted to give a message to C from (or about) C's mother. However, it emerged from the applicant's testimony that her mother was home at the time and spoke directly with the unknowns, which was omitted from the BOC.

[28] The RAD confirmed that the applicant could not explain the inconsistency when the RPD asked her about it, which the applicant conceded she could not.

[29] I find no reviewable error in the RAD's analysis.

[30] First, I do not accept the applicant's position that there was actually no inconsistency between the BOC and her testimony. This argument was based on a new and revised reading of the BOC that was not raised until this Court application, capitalizing on alleged ambiguity in the BOC language used to describe the unknown persons who talked to the neighbour or to the applicant's mother. According to the applicant, "her" referred to her mother rather than the neighbour at one point in the BOC and to C at another point in the same paragraph. On this theory, the message from C's mother was intended for the applicant's mother (not for C). The applicant then argued that in fact there were two visits by the unknown persons (one visit to the neighbours and another to her mother).

[31] In my view, the applicant's new reading of the BOC, which she acknowledged at the hearing was not put to the RAD, is strained and inconsistent with its natural meaning. The applicant also did not explain why C's mother would want to pass a message to the applicant's mother. The possibility of two visits by the unknowns appears to be an entirely new factual theory of what happened prior to the robbery – a change in the chronology of events which, again, which was not raised before the RAD or the RPD.

[32] Second, the alleged inconsistency was not the product of a microscopic analysis by the RAD and was not peripheral to a reasonable analysis of the applicant's credibility and her claim for protection. The applicant made this argument to the RAD, which found that the incident involving direct contact between her mother and the unknown persons (criminals looking for C) at their home was connected to a central element of the applicant's claim. It was therefore material and the omission from the BOC was not reasonably explained. In my view, this analysis was open to the RAD in the circumstances. The visit of the unknown persons to the home was important to the overall case, because only this event tied together the applicant's relationship with C, the persons who came to her home looking for C, the criminals pursuing C and the applicant, and the subsequent robbery of the home that formed the basis of her claim for *IRPA* protection.

[33] Third, the applicant argued that the RAD erred by relying on the single omission in the BOC and then failing to assess the robbery at her home, which she characterized as the central pillar of her claim for *IRPA* protection. As the RAD made no reviewable error in its assessment

of credibility, as just explained, it was not a reviewable error in this case not to review the robbery incident in more detail than it did.

[34] The applicant has therefore not shown that the RAD's decision was unreasonable on the basis alleged.

C. Did the RAD make a reviewable error in its analysis of the country evidence?

[35] The applicant submitted that the RAD and the RPD erred by relying selectively on the country evidence for Mexico related to the treatment of members of the LGBTQ+ community. She identified other RAD decisions that came to a different conclusion than in this case, arguing that the RAD made the same error as the Court found in *Ramirez Cueto v. Canada (Citizenship and Immigration),* 2021 FC 954. The respondent submitted that the applicant did not challenge the RPD's findings on her appeal to the RAD, so she could not challenge the RPD's substantive analysis on this judicial review. The respondent also argued that the applicant's submissions amounted to a request to reweigh the country condition evidence.

[36] The RPD considered the applicant's testimony as to what occurred in Mexico. It concluded that no one was searching for her due to her relationship with C or her sexual orientation. The RPD also considered the applicant's circumstances on her return to Mexico as a member of the LGBTQ+ community. General discriminatory attitudes and harassment in Mexico, while difficult and inexcusable, did not rise to the level of persecution. The applicant did not face persecution herself. The RPD considered information from the National Documentation Package ("NDP") for Mexico, which led it to conclude that there was a thriving

and active culture accepting of gays and lesbians in Mexico City where the applicant would be able to live without a serious possibility of persecution from the general population. Based on the evidence adduced, including the applicant's testimony, the RPD concluded that the applicant would not face persecution due to her sexual orientation nor treatment contrary to subsection 97(1) of the *IRPA*.

[37] On appeal, the RAD noted that the applicant did not specifically challenge the RPD's finding that the discriminatory attitudes towards the applicant based on her sexual orientation did not rise to the level of persecution and did not involve a risk to her life or risk of serious physical harm. The RAD advised that it independently reviewed the record and the hearing transcript and found no error in the RPD's conclusion.

[38] The RAD also addressed the applicant's arguments on appeal that the RPD failed to apply the Chairperson's Guideline 9: *Proceedings Before the IRB Involving Sexual Orientation and Gender Identity and Expression* (the "SOGIE Guideline") and failed to consider the RPD member's "inappropriate" attitude and comments during the hearing. The applicant did not challenge the RAD's conclusions that the RPD applied the SOGIE Guideline and that the RPD member's questions were appropriate.

[39] On this application, the applicant criticized the RPD's failure to consider certain parts of the NDP for Mexico. While I do not diminish the contents of the passages cited by the applicant, they do not provide a basis for the Court to find a reviewable error in the RAD's decision that is under review. The applicant's argument based on *Ramirez Cueto* does not succeed.

[40] As a general rule, issues should be placed before a decision maker or they may be considered new issues on a judicial review of the decision and will not be considered: *Firsov v. Canada (Attorney General),* 2022 FCA 191, at para 49; *Gordillo v. Canada (Attorney General),* 2022 FCA 23, at para 99. The Federal Court of Appeal has recently reconfirmed this general principle: see e.g., *Sullivan v. Canada (Attorney General),* 2024 FCA 7, at para 8; *Terra Reproductions Inc. v. Canada (Attorney General),* 2023 FCA 214, at para 6.

[41] Similarly, a RAD decision cannot normally be impugned on the basis of an issue not put to it, particularly if the new issue raised for the first time on judicial review relates to its specialized functions or expertise: *Canada (Citizenship and Immigration) v. R. K.,* 2016 FCA 272, at para 6, citing *Alberta (Information and Privacy Commissioner) v. Alberta Teachers' Association,* 2011 SCC 61, [2011] 3 SCR. 654, at paragraphs 23-25.

[42] In this case, on her appeal to the RAD, the applicant did not challenge the RPD's findings or raise arguments concerning discrimination amounting to persecution in Mexico or in Mexico City, and she made no submissions in her appeal memorandum on the contents of the NDP for Mexico. The applicant also did not refer to any of the prior RAD decisions she identified on this application, or argue that the RAD's decision on her appeal had to be consistent with them. In short, the issues now raised by the applicant were not put to the RAD, which only reviewed the record and the hearing transcript and found no error in the RPD's conclusion. The applicant's arguments in substance challenged the RPD's conclusion and the RAD's failure to come to a different conclusion without being asked to do so on the grounds argued in this Court. Recognizing the RAD's decision making role on appeals from the RPD, the Court should not

intervene in this case: *Oluwafemi v. Canada (Citizenship and Immigration),* 2023 FC 564, at paras 36-37; *Garcia Corrales v. Canada (Citizenship and Immigration),* 2022 FC 956, at paras 14, 24; *Ramirez v. Canada (Citizenship and Immigration),* 2022 FC 35, at paras 17-19; *Obalade v. Canada (Citizenship and Immigration),* 2021 FC 1030, at para 11; *Dahal v. Canada (Citizenship and Immigration),* 2017 FC 1102, at para 35; *Ghauri v. Canada (Citizenship and Immigration),* 2016 FC 548, at paras 30-34.

[43] Accordingly, I conclude that the RAD did not make a reviewable error as the applicant submitted.

IV. Conclusion

[44] For these reasons, the application will be dismissed.

[45] No question arises to certify for appeal.

JUDGMENT IN IMM-951-22

1. The application is dismissed.
2. 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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APPEARANCES:

Kes Posgate	FOR THE APPLICANT
Rachel Beaupré	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Battista Smith Migration Law Group Toronto, Ontario	OR THE APPLICANT
Attorney General of Canada Toronto, Ontario	FOR THE RESPONDENT