Federal Court  Cour fédérale

Date: 20150721

Docket: IMM-7565-14

Citation: 2015 FC 888

Ottawa, Ontario, July 21, 2015

PRESENT: The Honourable Madam Justice Strickland

BETWEEN:

RODRIGUEZ TORRES, DAYSI
(A.K.A. RODRIGUEZ TORRES, DAYSY)

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

[1] This is an application for judicial review of a decision of the Refugee Appeal Division (RAD) of the Immigration and Refugee Board of Canada, dated October 10, 2014, in which the RAD confirmed the finding of the Refugee Protection Division (RPD) that the Applicant is neither a Convention refugee nor a person in need of protection pursuant to s 96 or s 97, respectively, of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA].

[2] Having reviewed the materials filed and heard the submissions of counsel for the parties, this application is denied.

[3] The Applicant, Daysi Rodriguez Torres, is a citizen of Cuba. The Applicant claims that she was employed at a school in Havana and became involved in a play which protested the poor living conditions of the students at the school. As a result, she was considered to be politically unreliable, her employment was terminated and she was sought and harassed by the authorities.

[4] On April 26, 2013 she entered Canada with her mother on a temporary resident visa that she obtained using an employment letter in support of her application, and stayed with her aunt who sponsored her application. Her mother returned to Cuba in July 2013. The Applicant remained in Canada and sought refugee protection in October 2013 claiming that she fears returning to Cuba because she will continue to be harassed by the authorities, kept under surveillance, and will not have the right to work or study.

[5] The RPD, in its decision dated May 30, 2014, found that the Applicant had not demonstrated on the balance of probabilities with credible and trustworthy evidence, that she was involved in the protest play or that she was subsequently targeted by state authorities. The RPD also found that there remained no residual profile sufficient to support her claim.

[6] The RPD found that the Applicant was evasive in her responses to questions about her involvement in the protest play and inconsistent with her narrative. Further, although the Applicant claimed that as a result of participating in the play she had been dismissed from her

employment in March 2013, she provided a letter of employment from her former employer to the Canadian Embassy in support of her April 2013 visa application. She explained that the letter of employment was not genuine in the sense that she was no longer employed there, and that her friend had facilitated the obtaining of the letter for which she had paid. The RPD found that her explanation as to whether she was dismissed or employed was not credible as it too contained inconsistencies. Specifically, that the Applicant had claimed that her friend had given her the employment letter in March 2013, but also that he had left Cuba within a month of the protest play, which would have been November 2012, because he too was having difficulties with the Cuban authorities. When confronted with this, she stated that she had been mistaken due to nervousness, and that it was her friend's mother who had hand-delivered the employment letter to her. However, the RPD noted that neither event was in harmony with her narrative which suggested that her friend's involvement was limited to putting her in touch with someone who obtained a false employment letter for her. Based on these inconsistencies, the RPD found that it was more likely than not that the Applicant was working at the school when she made her visa application and had not been involved in a protest play or dismissed from her employment as a result.

[7] The RPD also noted a material omission in her amended narrative arising from her testimony, concerning two students who had been involved with the play and had been forced to leave Cuba. It also did not accept as reliable an undated letter of support from her friend, now in Chile, corroborating her account of her employment and her role in the play, because the Applicant's allegation of this friend having provided a false letter of employment for her visa application undermined the reliability of the letter. In addition, the Applicant had given

inconsistent testimony as to when her friend left Cuba, and the RPD found that this lack of knowledge about when he left undermined her allegation that he underwent experiences similar to her that forced him to leave.

[8] The RPD gave no weight to her undated letter of dismissal because it had found her explanation that the conflicting employment letter was false was not credible, and because the dismissal letter was undated and did not state when she was dismissed.

[9] The RPD also had concerns about the fact that although the Applicant had arrived in Canada in April 2013, she did not make her claim for protection until October 2013. It did not accept her explanation for the delay, being that her aunt who sponsored her visa application was afraid that she would have problems if the Applicant were to make such a claim, and that it was only after her aunt was assured by a lawyer that this would not be the case was the Applicant able to make her claim. The RPD found this explanation not to be credible as it did not align with her allegation that her life would be in danger if she returned to Cuba and noted that she did not call her aunt as a witness to address the delay. The RPD also noted that the Applicant had made two prior unsuccessful attempts in 2009 and 2010 to acquire a temporary resident visa to enter Canada.

[10] Finally the RPD noted that the Applicant feared only the Cuban state and had no other reason for fearing return, and thus there was no residual profile sufficient to support her claim.

[11] In her appeal of the RPD decision before the RAD, the Applicant submitted that the RPD erred in its assessment of her credibility. She also asked the RAD to accept new evidence in support of her appeal. The RAD reviewed the test for the admission of new evidence in s 110(4) of the IRPA and found that even when a document meets the s 110(4) test, this did not require the RAD to admit it into evidence without further consideration. The RAD found that the factors in *Raza v Canada (Minister of Citizenship and Immigration)*, 2007 FCA 385 paras 13-15 [*Raza*] should be considered in assessing the admissibility of the four items of proposed new evidence (*Iyamuremye v Canada (Minister of Immigration and Citizenship)*, 2014 FC 494 at para 45).

[12] The first item of new evidence was a new letter from the Applicant's mother dated June 12, 2014. This repeated the allegations made in the Applicant's refugee claim but also stated that her mother paid money to the Applicant's former supervisor at the school where she had worked to obtain the dismissal letter. Based on *Raza*, the RAD noted that a document's "newness" cannot be tested solely by its date of creation; rather, what is important is the event or circumstances sought to be proved by the evidence. The RAD found that although the letter from the Applicant's mother was dated after the RPD hearing, its content pre-dated that rejection. As the Applicant had provided the dismissal letter to the RPD, her mother's actions taken to obtain it had to have occurred prior to the RPD's rejection. Therefore, the RAD found that the Applicant could reasonably have been expected to have provided her mother's explanation to the RPD. Instead, she waited to see if the RPD would accept the untruthful explanation. The letter was found to be inadmissible as new evidence.

[13] As the Applicant has not, in this judicial review, challenged the RAD's findings that the other three new documents were also inadmissible, its reasoning need not be addressed here. However, it is of note that the fourth document was a statutory declaration of the Applicant dated July 10, 2014 in which the Applicant admitted to misrepresenting to the RPD the date of her dismissal from employment. She was actually dismissed in 2011, not 2012, and claimed that she misrepresented this for fear of being faulted for her delay in leaving Cuba. She also admitted that she had misrepresented how she obtained the employment letter for purposes of her visa application. The RAD noted that the misrepresentations were not raised until the Applicant learned that they had not convinced the RPD to accept her claim, and only then did she raise them on appeal.

[14] The Applicant submitted before the RAD that it should follow *Huruglica v Canada (Minister of Citizenship and Immigration)*, 2014 FC 799 [*Huruglica*] and conduct an independent assessment of the evidence in the RPD record. The RAD noted that in *Huruglica*, the Court determined that the RAD is to conduct a hybrid appeal. Therefore, the RAD should review all aspects of the RPD's decision and come to an independent assessment of the Applicant's refugee claim, deferring to the RPD only where it enjoys a particular advantage in reaching a conclusion. Where the RAD's assessment departs from that of the RPD, the RAD must substitute its own determination.

[15] As to the Applicant's assertion that the RPD erred in rejecting her claim on the basis of credibility, the RAD considered the RPD's treatment of the dismissal letter and the Applicant's assertions that the existence of other credibility concerns did not permit the RPD to give the

letter no weight. The RAD also noted the Applicant's submission that the RPD had no expertise in the assessment of foreign documents and, therefore, could not discount the letter because of the absence of dates. The RAD noted that the RPD's finding was directly related to the Applicant's testimony and, therefore, its credibility finding was to be respected. In any event, even without such deference, based on its own review of the evidence, which it set out in detail, the RAD found that it would have reached the same conclusion and that the RPD did not err in giving no weight to the dismissal letter.

[16] As to the Applicant's submission that her profile as a politically unreliable woman with no possibility of employment was sufficient to establish her claim, the RAD noted that this could not succeed as the RPD, citing many credibility concerns, found that she had not established the allegations underlying her claim. Therefore, she failed to establish the alleged profile.

[17] As to delay, on appeal the Applicant submitted that the RPD improperly speculated that her aunt would not fear consequences if the Applicant had claimed protection earlier and that there was no legal requirement to seek protection at the moment of entry into Canada. The RAD noted that deference was owed to the RPD on this credibility finding but, in any event, that it would have reached the same conclusion based on its own review of the evidence. In that regard, the RAD noted the Applicant's two prior attempts to enter Canada as well as her delay in claiming protection when she finally succeeded. Together this suggested that she did not come to Canada for refugee protection. The RAD further found that if her aunt was the cause of the delay, the Applicant could have asked her to provide an affidavit or called her as a witness to explain this but had failed to do so. And, even if her explanation was believed, it would not

resolve the issue of delay. She arrived in April alleging that she feared persecution but did not claim at that time. Her mother returned to Cuba in July 2013 and learned that the authorities were seeking the Applicant, yet a claim was not made at that time either. In August 2013, a lawyer confirmed that the claim could be made without repercussion to her aunt, yet she did not file until October 2013. The RAD concluded that this lackadaisical approach to seeking protection was not consistent with her alleged fear.

[18] The RAD concluded that the RPD did not err in giving no weight to the dismissal letter, in its assessment of her profile or in its treatment of the delay in claiming. The RPD had also made other credibility findings that were not challenged by the Applicant and it did not err in finding the Applicant to be generally lacking in credibility. The RAD confirmed the RPD's decision that the Applicant is neither a Convention refugee nor a person in need of protection and dismissed her appeal.

[19] Upon judicial review, the Applicant submits that the RAD erred in refusing to admit her mother's letter as new evidence, in giving no weight to the dismissal letter and in its credibility and delay assessments.

[20] In my view, the primary issue is whether the RAD reasonably refused to admit the letter from the Applicant's mother as new evidence, as the success of the remaining issues raised by the Applicant is dependent upon that issue.

[21] According to the Applicant, s 110(4) is to be interpreted such that the RPD's finding of a lack of credibility can be properly contradicted on the basis of new evidence (*Raza* at para 26; *Elizi v Canada (Minister of Citizenship and Immigration)*, 2007 FC 240 at paras 43-46 [*Elizi*]). The Applicant further submits that *Singh v Canada (Minister of Citizenship and Immigration)*, 2014 FC 1022 at paras 49-57, 64-66 warned against a technical interpretation of the rules relating to the admissibility of new evidence in the RAD context and requires a lenient approach when deciding if the evidence, if material, was reasonably available prior to the RPD hearing or if the applicant could not reasonably have been expected in the circumstances to have presented it.

[22] The letter from the Applicant's mother established that because the Applicant had been labeled as politically unreliable, she was unable to work and that she had been harassed and interrogated by the authorities as a suspected dissident. It also explained how her mother obtained the dismissal letter and could have established the Applicant's profile as a dissident and supported the authenticity of the dismissal letter which the RPD found to be false. The Applicant asserts that, regardless of the fact that the letter from her mother was technically inadmissible as it was reasonably available, based on the requirements of s 110(4), the RAD was still required to admit it as it goes to the heart of her claim and because it is capable of contradicting the RAD's credibility findings and thereby, potentially, could have resulted in another outcome. As such, the Applicant submits that such critical new evidence should have been admitted.

[23] The Applicant also submits that the RAD erred in giving no weight to the dismissal letter. Although the RAD noted that the letter lacked contact information or dates and that the Applicant had presented an employment letter from the same school in support of her visa

application, the Applicant argues that its assessment was tainted by the RAD's negative credibility finding. Had her mother's letter been accepted into evidence, the defects in the dismissal letter would have been explained.

[24] The Applicant takes the position that even if she was properly found not to be credible about certain aspects of her claim, such as the obtaining of the false employment letter, she could still have been found to be a Convention refugee due to credible evidence as to her profile as a dissident (*Kalsi v Canada (Minister of Citizenship and Immigration)*, 2004 FC 407 at paras 9-12). Although the RAD found that the Applicant's delay in claiming protection adversely affected her credibility, the Applicant submits that this is not a determinative factor. She submits that had she been able to establish her profile as a dissident through a proper assessment of the dismissal letter and her mother's letter, the outcome may have been different (*Huerta v Canada (Minister of Employment and Immigration)* (1993), 157 NR 225 (FCA) at p 227).

[25] To begin my analysis of the Applicant's submissions, I note that s 110(4) of the IRPA states that, on appeal, an applicant may present only evidence that arose after the rejection of their claim or that was not reasonably available, or that the person could not reasonably have been expected in the circumstances to have presented, at the time of the rejection.

[26] In the recent decision of *Singh* (currently under appeal, see: A-512-14), Justice Gagné concluded both the RAD's interpretation of s 110(4) of the IRPA (as a question of law that is not of general importance to the legal system as a whole and outside the expertise of the RAD) and

its application to the facts of this case (as a question of mixed fact and law) are to be reviewed on the reasonableness standard (at para 42). I agree with that view.

[27] As noted above, the Applicant asserts that, regardless of the fact that the letter from her mother was technically inadmissible as it was reasonably available prior to the RPD's rejection of her claim, the RAD was required to interpret s 110(4) in a flexible way and admit it as it goes to the heart of her claim and because it is capable of contradicting the RAD's credibility findings and thereby, potentially, resulting in another outcome.

[28] In my view, the test in *Raza*, relied upon by the Applicant in support of this view, does not permit a pre-removal risk assessment (PRRA) officer to admit evidence that does not meet the statutory conditions of s 113(a) of the IRPA, which are nearly identical to those of s 110(4). It is clear that the implicit factors articulated by the Federal Court of Appeal in *Raza* are only to be taken into consideration once an officer has determined that the evidence first meets one of the explicit statutory conditions. Thus, the factors in *Raza* only expand an officer's discretion by providing greater flexibility to refuse new evidence, rather than greater flexibility to admit new evidence.

[29] As stated in *De Silva v Canada (Minister of Immigration and Citizenship)*, 2007 FC 841 [*De Silva*] in the context of s 113(a):

> [17] Although the PRRA process is meant to assess only evidence of new risks, this does not mean that new evidence relating to old risks need not be considered. Moreover, one must be careful not to mix up the issue of whether evidence is new evidence under subsection 133(a) with the issue of whether the evidence establishes risk. **The PRRA officer should first**

> **consider whether a document falls within one of the three prongs of subsection 113(a). If it does, then the Officer should go on to consider whether the document evidences a new risk.**
>
> [Emphasis in bold added; emphasis in underline is original]

[30] Of note, in *Singh*, Justice Gagné ultimately found that the new evidence in that case could be material in demonstrating that the RPD erred in its credibility findings (at para 59) and that it was not reasonable, on the facts, for the RAD to conclude that the applicant should have brought the evidence before the RPD (at para 60). She also found it unreasonable for the RAD to have expected the applicant to have filed a complaint against his former lawyer. She concluded that the new evidence fell within the scope of s 110(4) and met its explicit criteria (at para 62).

[31] As to the Applicant's reference to *Elizi*, this is a decision of this Court made in the PRRA context and which pre-dates the Federal Court of Appeal's decision in *Raza*. There Justice de Montigny commented that if Canada is to respect its international obligations and abide by the Charter, "it cannot disregard credible evidence that a person would be at risk if sent back to his or her country of origin on the sole basis that this evidence is technically inadmissible" (at para 45). However, in *Elizi*, Justice de Montigny actually found that the officer's decision not to admit the applicant's new evidence under s 113(a) was unreasonable because it was either created after the RPD's decision, or the applicant could not reasonably have been expected in the circumstances to have presented the evidence to the RPD (at paras 39 and 43). In this regard, his comments on the admissibility of evidence that is "technically inadmissible" may properly be regarded as *obiter*. Further, this proposed broadening of the test under s 113(a) of the IRPA does not appear to have been subsequently followed.

[32] The Applicant also relies on *Sanchez v Canada (Minister of Citizenship and Immigration)*, 2009 FC 101 at para 26 [*Sanchez*], which is actually a stay decision. There the PRRA officer excluded a country condition document pursuant to s 113(a) of the IRPA on the basis that it was published prior to the date of his hearing and the applicant or his counsel could have located and presented it at the RPD hearing. Justice Shore found that the mere fact that the report was published prior to the hearing did not mean that it was obvious or easily accessible to the applicant. As it was not included in the National Documentation Package, he queried how the applicant and his counsel could reasonably have been expected to have located it. He also found that it was an extremely relevant report from a credible source. He stated that even if the officer may exclude a report under s 113(a), he had discretion to consider the report. On my reading of the decision, this conclusion appears to be based on Justice Shore's comment that a PRRA officer is not limited to considering evidence submitted by the applicant, but has an obligation to conduct sufficient independent research in order to come to a proper determination. The officer in that case had, in fact, consulted and relied on other sources. Justice Shore found that the PRRA officer failed to properly exercise his discretion to consider credible, material evidence that supported the applicant's allegations of risk. For this and other reasons, the applicant in that case had demonstrated that there was a serious issue to be tried and a stay was warranted.

[33] In my view, in *Sanchez* Justice Shore appears to find that there was a reasonable explanation as to why the report had not been submitted previously by the applicant. On that basis, even though it pre-dated the RPD hearing, the PRRA officer had the discretion to consider it as it was relevant and credible. The officer could also have considered it as part of his

independent research. As a result, I am not convinced that this case is of assistance to the Applicant.

[34] Here the Applicant does not challenge the RAD's finding that, although her mother's letter post-dated the rejection of the Applicant's claim by the RPD, its contents pre-dated that decision. Nor does she dispute that her mother's actions in obtaining the dismissal letter that was presented to the RPD must have also taken place before the rejection of the claim. She also does not suggest that the RAD erred in applying the newness analysis as per *Raza*. In fact, the Applicant concedes that her mother's letter "technically" does not meet the s 110(4) test. She instead asserts that a lenient or flexible interpretation of the s 110(4) test should permit the admission of her mother's letter. I do not agree.

[35] Here, the new evidence does not meet the explicit requirements of s 110(4). I see no reason why, as found in *De Silva* in the context of s 113(a), the new evidence should be admissible if that threshold requirement is not met. Nor do I understand *Singh* to suggest that the explicit statutory requirements of s 110(4) need not be met. Further, while it may be, as suggested in *Singh*, that in some circumstances the context of a RAD decision may require a consideration of different, or a modification of, the *Raza* factors, to be taken into account when assessing the admissibility of new evidence, in my view, this is not such a circumstance. Here, the Applicant knowingly misrepresented significant aspects of her evidence. She now seeks to use a lenient or flexible interpretation of s 110(4) to allow her to rehabilitate her credibility which was damaged by her own actions which she admitted to in her statutory declaration that she also sought to admit as new evidence. I do not believe that any reasonable interpretation of s

110(4) would permit the admission of this new evidence in these circumstances, nor that its exclusion gives rise to the loss of a "full-fact based appeal".

[36] As to the dismissal letter, in my view, as noted by the RAD, the RPD's finding was directly related to the Applicant's testimony. Accordingly, there is jurisprudence that supports that it was open to the RAD to defer to that credibility finding (*Huruglica* at para 37; *Yin v Canada (Minister of Citizenship and Immigration)*, 2014 FC 1209; *Pataria v Canada (Minister of Citizenship and Immigration)*, 2015 FC 465). However, even if that were not so, the RAD stated that it reached the same conclusion based on its own review of the evidence. It noted that the Applicant had provided a letter of employment in support of her visa application which shows that she was employed at a time that she claims to have been jobless. She gave inconsistent evidence as to how that letter was obtained. Further, the dismissal letter contained no phone number, mailing address, email address, web site or any other contact information. It was undated and did not give the date of the termination. Considered alone, the dismissal letter warranted little weight. Considered in the context of the Applicant's evidence concerning the employment letter, it was of even less probative value. In my view, the RAD's analysis was reasonable and the Applicant simply takes issue with the weight afforded to it by the RAD. It is not the role of this court to reweigh the evidence (*Win v Canada (Minister of Citizenship and Immigration)*, 2008 FC 1154 at para 9).

[37] As to credibility, while the RPD made many negative credibility findings, the Applicant did not challenge these before the RAD. Instead she submitted to the RAD, as she does here on judicial review, that her profile as a politically unreliable woman with no possibility of employment is enough to establish her claim for refugee protection. As noted by the RAD, this

could not succeed because, based on its credibility concerns, the RPD found that the Applicant had not established the allegations underlying her claim. Therefore, she failed to establish her alleged profile. In my view, the RAD did not err in this regard. There was no new admissible evidence to support her claim and bring into question the RPD's credibility findings, which she did not otherwise challenge before the RAD, or to link her situation to that of the individuals in the country conditions.

[38] Finally, the RAD fully assessed the Applicant's submission as to her delay in claiming protection. It accepted the RPD's credibility finding but went on to assess the evidence itself and reached the same conclusion. The Applicant does not challenge that finding but asserts that it is not determinative. However, this does not assist the Applicant as the RAD's treatment of the dismissal letter and her mother's letter was reasonable. Her delay was only one of the considerations that led to the dismissal of her appeal.

[39] The RAD's assessment of the admissibility of the new evidence, the dismissal letter, the Applicant's profile and the delay issue was reasonable as it falls within a range of possible acceptable outcomes which are defensible in respect of the facts and the law (*Dunsmuir v New Brunswick*, 2008 SCC 9 at para 47).

JUDGMENT

THIS COURT'S JUDGMENT is that

1. The application for judicial review is dismissed.

2. There shall be no order as to costs.

3. No question of general importance for certification was proposed or arises.

"Cecily Y. Strickland"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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APPEARANCES:

Ronald Shacter	FOR THE APPLICANT
A. Leena Jaakkimainen	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Silcoff, Shacter Barristers & Solicitors Toronto, Ontario	FOR THE APPLICANT
William F. Pentney Deputy Attorney General of Canada Toronto, Ontario	FOR THE RESPONDENT